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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 332

STOCKARD STEAMSHIP CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners [1] pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered by the court

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[1] The cases below were decided *sub nom. American-Foreign Steamship Corporation, et al.* v. *United States.* The petitioners herein, in addition to the above named, are A. H. Bull Steamship Co., *et al.;* New York and Cuba Mail Steamship Company; Dichmann, Wright & Pugh, Inc.; Polarus Steamship Co., Inc.; A. L. Burbank & Company, Ltd.; T. J. Stevenson & Co., Inc., North Atlantic and Gulf Steamship Co. (two cases); Luckenbach Steamship Company, Inc.; Blidberg Rothchild Co., Inc.; and Fall River Navigation Company (two cases).

en banc, in a group of fourteen cases on May 26, 1961. This petition covers thirteen of the cases. A separate petition was filed August 5, 1961, in *American-Foreign Steamship Corporation* v. *United States* (No. 290).

OPINIONS BELOW

1. District Courts

The opinion covering ten of the libels is reported as *A. H. Bull Steamship Co.* v. *United States,* 141 F. Supp. 58 (Palmieri, D. J., S.D.N.Y. 1956). The memorandum opinion covering the remaining three libels (Herlands, D.J., S.D.N.Y. 1956) is not reported, but is set forth in a footnote to the opinion of the three-judge panel of the Court of Appeals, *sub. nom. American-Foreign Steamship Corporation, et al.* v. *United States,* dated September 25, 1957, reported at 265 F. 2d 136, at 140.

2. Court of Appeals

The panel opinion of September 25, 1957, as noted above, is reported at 265 F. 2d 136. The opinion on the first rehearing *en banc,* dated July 28, 1958, which was in favor of petitioners, is reported at 265 F. 2d 136, at 144, and is contained in Appendix A *infra,* pp. 1a-26a (hereinafter referred to as "App. A, p. —"). The opinion dated March 26, 1959, denying the Government's petition for further rehearing, is reported at 265 F. 2d 136, at 153.

3. Supreme Court of the United States

The opinion of this Court, dated June 20, 1960, vacating the *en banc* decision on the ground that Judge Medina was ineligible to participate therein, is reported at 363 U. S. 685.

4. Court of Appeals Upon Remand

The opinion of the Court of Appeals, dated May 26, 1961, adverse to petitioners and here sought to be reviewed, is not yet reported, but is set forth in Appendix A, pp. 27a-68a. The judgments of the Court of Appeals appear in Appendix A, pp. 69a-72a.

JURISDICTION

The opinion of the Court of Appeals *en banc* was filed May 26, 1961. No rehearing was requested. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is a clause in a government contract, which provides that the contractor's claim for payment or refund must await final audit of his account, invalid as an attempt unlawfully to extend the statute of limitations?

2. May a contractor sue the United States under the Declaratory Judgment Act for a declaration that a contract term is in violation of statute; and if so, is the commencement of the limitations period advanced to the date when the contract is signed?

3. May a government contract lawfully provide that a payment, made under a contract clause which is protested as being in violation of statute, shall be conditional and subject to later suit for its recovery; is such conditional payment a voluntary payment; and is a suit to recover such payment subject to summary dismissal without trial, although the voluntary payment issue has not been raised in the pleadings?

4. Was it error to deprive petitioners of a trial, reject their uncontradicted evidence as to what the

parties intended by a reservation clause in their contract, and summarily decide that most of petitioners' claims were time-barred?

STATUTES INVOLVED

The statutes involved are the Suits in Admiralty Act (46 U.S.C. 741-752), the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1735-1746), the Merchant Marine Act, 1936 (46 U.S.C. 1101-1294), and the Declaratory Judgment Act (28 U.S.C. 2201-2202). The relevant provisions of these acts are set forth in Appendix A, pp. 73a-76a.

STATEMENT

A. THE NATURE OF THE LITIGATION

Petititoners are steamship owners and operators who, between 1946 and 1952, chartered some 225 government-owned merchant vessels under fleet charters from the Maritime Commission and its successor, the Maritime Administration (collectively referred to as "Maritime"), pursuant to section 5(b) of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1738), and section 709(a) of the Merchant Marine Act, 1936 (46 U.S.C. 1199(a)).[2]

The charter hire paid by petitioners consisted of (1) "basic charter hire," fixed under section 5(b) of the Merchant Ship Sales Act of 1946, at 15 percent per annum of the sales price of each vessel, payable monthly; and (2) "additional charter hire," specified by section 709(a) of the Merchant Marine Act, 1936, to be 50 percent of the cumulative net voyage profits in excess of a return of 10 percent upon the capital required to operate the vessels.

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[2] These sections are set forth in Appendix A, pp. 73a-75a.

In 1946, when the post-World War II chartering program was inaugurated, Maritime announced that additional charter hire would be set at a sliding scale ranging from 50 to 90 percent of profits. Petitioners protested because the sliding scale proposal was in conflict with the mandatory terms of section 709(a) (App. A, p. 34a).[3] Because of this protest Maritime amended Clause 13 of the charters[4] to provide in unqualified terms that any payment of additional charter hire would be preliminary and "such overpayments refunded to the charterer as may be required" upon "final audit"[5] of the charterer's accounting (App. A, pp. 42a, 58a). On this basis the charters were signed.

Further unqualified reservations of rights in respect of all disputes over additional charter hire (including

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[3] Rates of additional charter hire in excess of 50 percent were held to be unlawful in *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D.N.Y. 1956), and *American Export Lines, Inc.* v. *United States*, — C. Cls. — (Case No. 70-56, decided April 7, 1961, rehearing denied July 19, 1961).

[4] The Government's brief, filed November 29, 1960, with the last *en banc* court, stated, at page 48, that the charter was modified in this respect because of the charterers' protests:

> Because of the dispute as to possible violation of the statutes, Maritime changed the language [of the charter] to make it even clearer that suit should be filed at once.

[5] Clause 13 provided in part:

> The Charterer agrees to make preliminary payments to the Owner . . . at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required. (App. A, pp. 34a-35a).

specifically disputes based on deviations from the statutes)[6] were contained in regulations, and accounting instructions.[7] See 46 C.F.R. 299.31(k)(l); 46 C.F.R. 299.39(a), (b); 46 C.F.R. 299.40(c); 46 C.F.R. 299.56(b)(5).[8]

Tentative accountings for profits and losses from vessel operations were regularly prepared and submitted by the charterers both before and after the chartered vessels were redelivered. Preliminary payments or refunds of additional charter hire were made from time to time in accordance with these statements. If a statement showed an increase in cumulative profit over the previous statement, the charterer made a further payment; if the statement showed a decrease in cumulative profit, so that the amount of additional charter hire already paid was more than was required, the charterer was entitled to a refund. (See typical sched-

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[6] For example, the regulations stated (46 C.F.R. 299.56(b)(5)):

> That if, in any instance, the rules and regulations prescribed herein should conflict with the provisions of an applicable statute or agreement, such provisions shall govern.

[7] Petitioners' payments were made in accordance with the following instruction which Maritime sent to all charterers (App. A, p. 10a):

> Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreement involved or otherwise.

[8] 1954 Edition.

ule of payments and refunds of petitioner T. J. Stevenson & Co., Inc., App. A, p. 79a.)

During this period certain of Maritime's interpretations of the statutes and charters gave rise to disputes in addition to the sliding scale problem.[9] Nevertheless, Maritime urged the charterers to continue making payments of additional charter hire, pointing out that payments were conditional under Clause 13, and that their rights to recover were reserved until final audit (C.A. Rec. Blidberg, pp. 59-60, 69, 107-109, 111-112, 115-125).[10] Most of the charterers accordingly made preliminary payments pursuant to Maritime's theories, as required by the charters, but all subject to the unqualified reservations in Clause 13, and the regulations and instructions.[11]

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[9] These later disputes involved, *inter alia*, the issue of cumulation. Maritime permitted losses to be carried forward and offset against profits in later years, but did not permit losses to be offset against earlier profits. Petitioners believe that Maritime has misconstrued the cumulative accounting provision of section 709(a) of the Merchant Marine Act, 1936 (46 U.S.C. 1199(a)) and of the charters. Maritime also required the year 1947 to be divided into two parts for the purpose of computing additional charter hire, contrary to these cumulative accounting provisions. Other disputes are summarized in the opinions below. (App. A, pp. 35a-36a.)

[10] The record of the Court of Appeals consists of fourteen sections, thirteen of which, each numbered beginning at page 1, contain the district court proceedings in the individual cases. Reference to these sections is made herein by company, *e.g.* "C.A. Rec. Stockard, p. —." The last section contains the proceedings before the *en banc* court on remand from this Court, including the opinion and judgments. The pages are numbered pages 590a to 702a, and this section is referred to herein as "C.A. Rec., p. —."

[11] However, when the Department of Justice took the position, contrary to that of Maritime, that Clause 13 did not reserve the additional charter hire claims, the charterers had no alternative but to stop making payments.

At final audit, petitioners requested refunds of claimed overpayments of additional charter hire, including amounts admitted to be due on Maritime's own accounting theories. These were refused, and libels were then filed, in each case not later than within two years of final audit (App. A, p. 36a; see also tabulation at 265 F. 2d, at 143). The limitation period specified by section 5 of the Suits in Admiralty Act is two years (App. A, p. 72a).

B. PROCEEDINGS BELOW

1. District Courts

The thirteen libels were filed between April 1954 and February 1956. The Government filed exceptions and exceptive allegations asserting that each libel was time-barred, because filed more than two years after redelivery of the last vessel under the respective fleet charter.[12] The Government showed only the redelivery dates and submitted no other evidence. The district courts denied petitioners' motions to amend the libels to include further allegations of fact bearing on the time-bar issue; sustained the exceptions and exceptive allegations on time-bar; and held that even payments made within two years of the filing of the libels were voluntary and unrecoverable, although no such defense was pleaded. (App. A, p. 47a) The libels were dismissed upon the authority of *Sword Line, Inc.* v. *United States,* 228 F. 2d 344 (2 Cir. 1955), *aff'd,* 231 F. 2d 75, *affirmed as to admiralty jurisdiction,* 351 U.S. 976;

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[12] In its brief to the first *en banc* court, dated January 8, 1958, the Government changed its earlier position and asserted that the statute of limitations began to run (a) on the date of each payment; (b) on the date of redelivery of the last vessel, unless the redelivery preceded publication of Maritime's accounting regulations on March 30, 1950, in which case the cause of action accrued on June 30, 1950; and (c) on a series of other dates.

and *American Eastern Corporation* v. *United States,* 133 F. Supp. 11 (S.D.N.Y. 1955), *affirmed without opinion,* 231 F. 2d 664, *cert. denied,* 351 U.S. 983.

2. Court of Appeals (Panel Decision)

On September 25, 1957, a three-judge panel (Circuit Judges Hincks and Medina and retired District Judge Leibell) affirmed the dismissals, 265 F. 2d 136, citing *Sword Line* and *American Eastern Corporation,* both *supra,* but stating (265 F. 2d, at p. 142):

> If the subject-matter of these appeals were *res nova,* we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. . .

3. Court of Appeals (First En Banc Decision)

The first *en banc* court consisted of Chief Judge Clark and Circuit Judges Medina, Hincks, Waterman and Moore, all in regular active service.[13] On July 28, 1958, that court released its three-to-two decision, reversing the district court dismissals, 265 F. 2d 136, at 144 (App. A, pp. 1a-26a).

The majority held that "the rights of the parties to these charters, so far as additional charter hire is concerned, are governed by Clause 13 . . ." (App. A, p. 12a). As to the Government's argument that the words "each final audit" in Clause 13 meant "each annual audit," the court thought that, since this issue had not been raised below, it should be passed upon by the trial court upon proper pleading and proof (App. A, pp. 12a-13a). And the court said, "but we think the text of

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[13] Judge Lumbard declined to participate because of his connection with the litigation in the district court during his tenure as United States Attorney.

Clause 13 is an adequate, *prima facie,* showing of jurisdiction in the absence of pleading and proof by the Government that the libelants' interpretation of Clause 13 is incorrect. . . ." (App. A, p. 13a).

The court found it unnecessary to pass upon the voluntary payment argument, but said, "we observe, however, that carried to its logical conclusion the contention is that every issue going to the merits is jurisdictional. . . ." (App. A, p. 11a, ftn.).

Judges Clark and Waterman dissented, adhering to their views in *Sword Line.* Judge Clark also questioned Judge Medina's eligibility to participate in the decision, because on March 1, 1958, after submission of the case but before decision, he had retired from regular active service under 28 U.S.C. 371(b) (App. A., p. 26a). The Government requested and was denied rehearing, the court dividing as it had in its opinion on the limitations point. 265 F. 2d, at 153.

4. In This Court

On June 20, 1960, this Court (Justices Harlan, Frankfurter and Brennan dissenting) vacated the *en banc* decision, on the ground that Judge Medina was not eligible to participate.[14] It stated, however, "in reaching this conclusion we intimate no view as to the merits of the underlying litigation." 363 U. S. 685, at 691. Petitioners' conditional cross-petition, asking review of the time-bar issue, was denied on June 27, 1960. 363 U. S. 842.

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[14] The Department of Justice has endorsed H.R. 5255 which would make a retired circuit judge eligible to sit *en banc* in the rehearing of a case in which he had previously participated in a panel decision. (See H.R. Rep. 422, 87th Cong., 1st Sess. (May 22, 1961), accompanying H.R. 5255.)

5. Court of Appeals Upon Remand (Second En Banc Decision)

Reargument *en banc* was granted by the Court of Appeals on November 14, 1960 (C. A. Rec. p. 600a). By this time, Judge Hincks had joined Judge Medina in retirement, and Judges Friendly and Smith had become members of the Court of Appeals. The court again split three-to-two, this time for all practical purposes ruling against petitioners on the time-bar issue. Judge Smith wrote what may be considered the majority opinion. Five cases were affirmed; eight were reversed and remanded, with instructions to determine whether there were claims which could be proven within the narrow exception to the time-bar prescribed in the opinion; and one appeal was dismissed. The factual basis for the affirmance or reversal of each individual case was not stated.

Judge Clark, joined by Judge Waterman, wrote a partially concurring-partially dissenting opinion restating his earlier views. Judge Friendly, joined by Judge Moore, dissented, agreeing, with the earlier *en banc* majority opinion of Judges Hincks, Medina and Moore (App. A. pp. 1a-26a) that the time-bar issue with respect to all additional charter hire claims was controlled by Clause 13.

Judge Smtih divided petitioners' claims for refund of excessive charter hire payments into two categories —those based on violation of statute, and those based on breach of charter terms. Ignoring the specific regulations stating otherwise (*supra*, p. 6), he held that the parties could not reasonably have intended the reservation in Clause 13 of the charters to apply to the statutory violation claims including the sliding scale profit sharing claim, which the Government admitted was the very claim that caused Maritime to amend

Clause 13, and even if that were the intent, it was unlawful as an attempt to extend the two-year limitation of the Suits in Admiralty Act; that payments in excess of the statutory requirements were time-barred if made two years before suit, and were voluntary and unrecoverable whenever made. He held, on the other hand, that the Clause 13 reservation was applicable to the breach of charter claims, but that it reserved only claims "brought within two years of preliminary statement or final audit, *whichever was earlier.*" [15] By adding the phrase, "whichever was earlier," which does not appear in Clause 13, he barred claims which even the Government had conceded were open to petitioners.[16]

The other four judges, rejecting Judge Smith's theory of limited applicability, recognized that the language of Clause 13 was unqualified and made no distinction between types of claims. However, Judges

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[15] Emphasis supplied in all quotations unless otherwise indicated.

[16] In *South Atlantic Steamship Line, Inc.* v. *United States* (D. Del.—Adm. Nos. 1735 and 1757), the Government's brief (pp. 14-15) admits that Clause 13 reserved certain disputes until final audit:

> This claim, although obscurely alleged, does not involve violation of the statutes, but obviously refers to a mere matter of acceptance of libelants' cost accounting adjustments for reasonable overhead "under the agreement" itself *and thus does not accrue until adjustment on final audit.* . . . It thus differs entirely from libelant's claims for statute violation and appears not to be dismissable, but to form correctly a part of South Atlantic's next or third cause in libel No. 1757.
>
> This third cause of South Atlantic is for overpayments of $16,432.92 "under respondent's regulations." This cause of action (Arts. 21-22), like the $150 a day overhead ceiling (Art. 7) in effect merely alleges that accepting the legality of the Government's contract and regulations *such an amount is owing to South Atlantic upon making the necessary accounting adjustments on the final audit.* . . .

Clark and Waterman thought that Clause 13 was not intended to reserve any of the claims, and Judges Friendly and Moore thought that Clause 13 was valid and reserved all claims until final audit.

Judge Smith noted the existence of a substantial question as to the propriety of dispensing with a trial and summarily determining the questions of (a) what the parties intended by the reservation in Clause 13, and (b) whether any of the payments were voluntary, particularly since the defense of voluntary payment had not even been pleaded (App. A, pp. 43a-44a, 47a). He thought a trial of the first question was unnecessary in light of his holding that the parties could not lawfully reserve the claims based on violation of the statute. But he denied petitioners a trial by deciding that the claims covered by Clause 13 were intended to be reserved until preliminary statement or final audit, *whichever was earlier,* when Clause 13 contained no such limiting language. As to the defense of voluntary payment, it is not clear whether he held (a) that it was unlawful for Clause 13 to provide that the payments were conditional, and therefore not voluntary, or (b) that the parties did not in fact so agree (which would be a summary determination, depriving petitioners of a trial).[17]

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[17] Judge Smith's opinion was influenced by two other basic factual misconceptions: (a) that the charterers waited almost a decade to sue, and (b) that they might recover interest on their overpayments (App. A., pp. 39a, 40a, 41a). Actually, Maritime itself delayed five years before issuing its accounting regulations. And the Comptroller General repeatedly criticized Maritime not only for this delay but also for its lengthy delays in auditing the charterers' accountings, which could not be submitted until after the regulations were issued. (See H. Doc. No. 46, 81st Cong., 2d Sess., pp. 87-88; H. Doc. No. 472, 82d Cong., 2d Sess., pp. 65-66; H. Doc. No. 383, 83d Cong., 2d Sess., p. 40.) Furthermore, section 5 of the Suits in Admiralty Act (46 U.S.C. 745) prohibits the award of interest for any period prior to suit.

It should be noted that Judges Hincks, Medina, Moore, Friendly and Learned Hand (in his dissent in *Sword Line, supra*) have agreed that petitioners' claims are not time-barred. But the contrary views of Judges Smith, Clark and Waterman have prevailed over those of the other five. And, since the three judges are in substantial disagreement among themselves, it is questionable whether it can be said that there is a majority opinion at all.

REASONS FOR GRANTING THE WRIT

A. THE NEED FOR AN AUTHORITATIVE DECISION

Forty-one cases, including those of these petitioners, based on the same form of charter, are pending in various district courts throughout the United States (App. A, pp. 77a-78a). District courts, other than in the Southern District of New York, have received briefs and heard argument on the time-bar issue in eleven cases and have been waiting for almost four years for a final decision in the instant cases. Other cases are being held in abeyance, likewise awaiting such decision.

But the authoritativeness of the decision below is undermined not only by disagreements among the three judges whose views have prevailed, but also by the fact that their views are contrary to those of the five other circuit judges who have passed upon the same issues. The decision wholly fails to supply the guidance for which other courts have been waiting. And, within the Second Circuit itself, when other similar cases are presented for review, the five judges who have been overruled will have to vote either against the prevailing views or else, out of comity, against their own convictions.

Moreover, as shown below, the decision is in conflict with decisions of other circuits in several substantial respects. The disagreements already present will inevitably engender further conflicts, both within the Second Circuit and with other circuits.

It is therefore appropriate and, we submit, imperative, that this Court put an end to these disagreements by an authoritative resolution of the issues here involved.

B. EFFECT OF DECISION ON GOVERNMENT CONTRACTS

The holding that Clause 13 was unlawful, if it was intended to apply to statutory disputes, has two serious and far reaching consequences. It severely limits the contracting powers of government agencies and it creates doubt as to the validity of existing government contracts, many of which have provisions for final payment or refund upon accounting, audit, or some other event, or provisions requiring the exhaustion of an administrative remedy before bringing suit. Under the decision below, if a contractor's claim is based on a statutory requirement, even if the issue arises after the contract is signed,[18] the claim cannot lawfully be covered by such provisions. As a result, many claims, thought to be reserved, are already time-barred and "the traps for the unwary," against which Judge Friendly warned (App. A, p. 64a), have already sprung shut.

Of like effect is the holding that a government agency may not lawfully agree that payments shall be condi-

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[18] In the instant cases, the issue over the division of 1947 into two parts for accounting purposes arose a year *after* the contract was signed. Judge Smith held that it could not lawfully be covered by Clause 13.

tional, and not voluntary, if they are subject to a dispute as to a statutory requirement.

Adherence to these holdings must necessarily result in making government contracts hazardous, and prudent contractors must hasten to court with a protective suit as each new dispute arises. Thus, for example, if petitioners had sued at the dates of each preliminary statement, as Judge Smith said they should have done to protect their rights, more than a hundred libels might have been filed.[19] Judge Friendly stated the sounder view when he said (App. A, pp. 67a-68a):

> Happily, persons engaged in the performance of complex contracts have learned other ways of working out their differences than constant resort to the courts; they wait until all the disputed items are before them and then generally come to a conclusion no less satisfactory for not being altogether scientific. The law of limitations should encourage this sensible process of adjustment—not require immediate entry into the judicial arena under threat of the expiry of a short statutory bar.

This question of public importance merits review by this Court.

C. AVAILABILITY OF DECLARATORY RELIEF

Another question of great public importance is whether the United States has consented to be sued for a declaratory judgment affecting contract rights and

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[19] Petitioners submitted, as part of their appendix in the court below, detailed statements showing the number and dates of preliminary payments, debits and credits, etc., under the charters. A typical statement for T. J. Stevenson & Co., Inc., is reproduced (App. A, p. 79a). This shows at least twenty-one preliminary payments of additional charter hire for this one petitioner, which would, correspondingly, require twenty-one law suits, instead of one.

liabilities and, if so, whether the availability of declaratory relief moves forward the date of time-bar.

Rule 59 of the General Admiralty Rules, effective July 19, 1961, has resolved the long unsettled question whether declaratory relief is available between private parties in admiralty.[20] But the weight of authority holds that the United States has not consented to be sued for a declaratory judgment.[21] Judge Smith's reliance for such consent on the Administrative Procedure Act (App. A, p. 38a) seems misplaced since section 4 of that Act (5 U.S.C. 1003) expressly excludes applicability to contracts.[22]

But assuming that the United States has consented to be sued for a declaratory judgment, there still re-

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[20] See 2 BENEDICT ON ADMIRALTY (6th ed.) 47-48; *McLain* v. *Lance*, 146 F. 2d 341, 343 (5 Cir. 1944), *cert. denied*, 325 U.S. 855. In the unreported case of *States Marine Lines, Inc.* v. *United States* (N.D. Calif., Doc. No. A 28008, July 20 1960) a suit for declaratory relief was dismissed for want of jurisdiction in admiralty.

[21] See, for example, *Larsen* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Mellos* v. *Brownell*, 250 F. 2d 35, 36 (D.C. Cir. 1957); *Adler* v. *Brownell*, 242 F. 2d 28, 29 (D.C. Cir. 1957); *Ove Gustavsson Contracting Company* v. *Floete*, 278 F. 2d 912, 914 (2 Cir. 1960), *cert. denied*, 364 U.S. 894; *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864, 870 (9 Cir. 1953); *Marshall* v. *Crotty*, 185 F. 2d 622, 627-8 (1 Cir. 1950); *cf.*, *Land* v. *Dollar*, 330 U.S. 731 (1947). 6 MOORE FEDERAL PRACTICE § 57.21 [1] (2d ed., p. 3123) unqualifiedly states, "the inapplicability of the declaratory judgment procedure to actions *against* the United States is due to the outmoded, but very real, doctrine that the United States cannot be sued without its consent and then only within the precise limits of the consent given." (Emphasis in original.)

There is, however, contrary dictum. *American President Lines, Ltd.* v. *United States*, 265 F. 2d 552 (3 Cir. 1959); *Luckenbach Steamship Company, Inc.* v. *United States*, — C. Cls. — (Case No. 240-59, July 19, 1961).

[22] *Ove Gustavsson Contracting Company* v. *Floete*; *Richfield Oil Corp.* v. *United States*, both *supra*.

mains the question, of great importance in the administration of justice, whether the availability of declaratory relief moves forward the date on which the statute of limitations otherwise would begin to run.

The rule against splitting causes of action [23] forecloses the piecemeal litigation of a multiplicity of disputes that may arise under any substantial contract. Yet Judge Smith's holding makes such piecemeal litigation inescapable, and causes to be already time-barred myriads of claims under other government contracts now awaiting possible adjustment or compromise as an alternative to litigation.

D. THE VOLUNTARY PAYMENT HOLDING IMPAIRS IMPORTANT RIGHTS CONFERRED BY CONGRESS

Judge Smith seemingly held that the parties could not lawfully agree that payments made in excess of the amounts required by statute would be conditional and not voluntary. The effect of this holding is that citizens are left without recourse when administrative agencies diminish or take away benefits conferred by Congress.

The chartering program and other programs were authorized by the Merchant Ship Sales Act of 1946 for the purpose of establishing and maintaining a strong merchant marine (see Declaration of Policy, sec. 2). In aid of this objective, Congress authorized the charter of vessels over which it exercised a substantial monopoly after World War II (App. A, p. 33a). Congress laid down certain of the terms and gave Maritime no discretion to alter them. Maritime therefore could not lawfully require the charterers to agree to more

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[23] *Baird* v. *United States*, 96 U.S. 430 (1878); *New York Scow Corporation* v. *Olsen*, 121 F. 2d 704 (2 Cir. 1941); *Holton* v. *United States*, 65 F. Supp. 903, 906 (C. Cls. 1946); *Myerle* v. *United States*, 33 C. Cls. 1, 21 (1897).

onerous terms.[24] But the holding below that the charterers' payments, in contravention of the terms fixed by Congress, were voluntary, notwithstanding the agreement to the contrary, enables the agency to nullify the congressional mandate with impunity. Under that holding, the charterer must either accept the charter on unlawful terms and waive his statutory rights, or not accept the charter at all.

The doctrine inherent in Judge Smith's decision in denying petitioners a right of recovery, is not confined to the shipping field. It would extend to all situations where a government agency, charged with the administration of a statute or congressional program, either charges a citizen more than Congress specifies, or restricts benefits clearly granted by statute, extracting

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[24] *Sword Line, Inc.* v. *United States*, 228 F. 2d 344 (2 Cir. 1955), *affirmed as to jurisdiction*, 351 U.S. 976 (1956); *A. H. Bull Steamship Co.* v. *United States*, 108 F. Supp. 95 (C. Cls. 1952); *Southeastern Oil Florida, Inc.* v. *United States*, 119 F. Supp. 731 (C. Cls. 1953), *cert. denied*, 348 U.S. 834; *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D.N.Y. 1956); *American Export Lines, Inc.* v. *United States*, — C. Cls. — (decided April 7, 1961, rehearing denied July 19, 1961); *Central Gulf Steamship Corporation* v. *United States*, 172 F. Supp. 701 (C. Cls. 1959).

Cases under other statutes:

International Railway Co. v. *Davidson*, 257 U.S. 506 (1922); *Brannan* v. *Stark*, 342 U.S. 451 (1922); *The Swift and Courtney and Beecher Company* v. *United States*, 105 U.S. 691 (1882); *The Swift and Courtney and Beecher Company* v. *United States*, 111 U.S. 22 (1884); *United States* v. *Laughlin*, 249 U.S. 440 (1919); *Work* v. *United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200 (1923); *Roberts* v. *United States*, 176 U.S. 221 (1900); *Peoples Bank* v. *Eccles*, 161 F. 2d 636 (D.C. Cir. 1947), *reversed on other grounds*, 333 U.S. 426; *California Electric Power Co.* v. *United States*, 60 F. Supp. 344 (C. Cls. 1945); *United States* v. *Smith*, 39 F. 2d 851 (1 Cir. 1930); *Glavey* v. *United States*, 182 U.S. 595 (1901); *McMath* v. *United States*, 248 U.S. 151 (1918); *United States* v. *Andrews*, 240 U.S. 90 (1916).

an agreement from the citizen as a condition of inducing the agency action, which agreement can be later relied upon to establish the defense of voluntary payment, acquiescence, or estoppel.

E. CONFLICTS WITH OTHER CIRCUITS

1. Summary Disposition

These cases were decided on the libels, supported by affidavits, and the Government's exceptions, alleging only that the suits had not been commenced within two years of the redelivery of the last vessels under charter, from which, the Government initially contended, the time-bar began to run.

Petitioners showed, and Judge Smith noted, that (a) the preliminary accountings, on the basis of which tentative payments or refunds of additional charter hire were made, were subject to substantial change for later losses, for later developed items of income and expense, for foreign agents' accounts, overhead, and results of personal injury and cargo damage litigation (App. A, p. 46a); (b) the regulations, pursuant to which the charterers were to make their accountings, were not issued until February 21, 1950, long after adoption of the form of charter in 1946, and more than two years after redelivery of the last vessels under some of the charters (App. A, p. 46a); (c) subsequent regulations were issued as late as June 1951 affecting the charterers' additional charter hire obligations and their accountings (see 46 C.F.R. 299.37-4(d), (e), (f) and (g), 1954 ed.); (d) standard instructions (quoted *supra,* p. 6), were issued by Maritime requiring charterers to transmit their payments with a letter stating that the same would not be regarded "as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise . . . ," and a

further regulation stating that statutory provisions were to prevail over inconsistent regulations; (e) Maritime consistently demanded payments of additional charter hire from the charterers, stating that they could rely on these regulations and instructions to protect their position, which caused Judge Friendly to comment (App. A, p. 67a, ftn.), "it ill becomes the Government to urge this [that payments were voluntary] in view of its repeated demands that the charterers make the payments and rely on their right to refund on final audit. . . ."; (f) Maritime deposited the additional charter hire payments in an "unearned moneys" trust account (App. A, p. 42a); and (g) as admitted by the Government, Clause 13 was amended to meet the objections of the charterers to the allegedly unlawful sliding scale of additional charter hire. The Government produced no contrary evidence.

Judge Smith recognized the possible ambiguity of Clause 13 (App. A, p. 41a), but, rejecting Maritime's contemporaneous interpretation, resolved that ambiguity against petitioners, and in favor of the Government which had drafted the charters.[25] Although recognizing the questionable propriety of depriving petitioners of a trial, he nevertheless decided that Clause 13 was not intended to and could not lawfully apply to statutory claims, including the very claim in response to which Clause 13 was amended; that it reserved contract claims until the dates of preliminary statements if they were earlier than final audit, although the clause did not so

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[25] The interpretation of Clause 13 as to which the parties had been in agreement should have been given great if not conclusive weight. *Providence Rubber Co.* v. *Goodyear*, 76 U.S. 788, 799 (1870); *United States* v. *Lennox Metal Manufacturing Co.*, 225 F. 2d 302, 315 (2 Cir. 1955); *American Bemberg Corporation* v. *United States*, 150 F. Supp. 355, 361 (D. Del. 1957).

provide; and that overpayments involved in the statutory claims were voluntary and unrecoverable because they were not or could not lawfully be made subject to the right of later recovery.

Petitioners were entitled to their day in court under the well settled rule stated in *Conley* v. *Gibson,* 355 U. S. 41, 45-46 (1957):

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Summary disposition, which deprived petitioners of the trial to which they were entitled under the due process clause of the Fifth Amendment, is in conflict with decisions of every one of the eleven circuits, including the Second.[26]

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[26] D. C. Circuit: *Callaway* v. *Hamilton Nat. Bank of Washington,* 195 F. 2d 556, 559 (1952)

1st Circuit: *Manosky* v. *Bethlehem-Hingham Shipyard,* 177 F. 2d 529, 531 (1949)

2nd Circuit: *Arnstein* v. *Porter,* 154 F. 2d 464, 468 (1946); *Knudsen* v. *Torrington Company,* 254 F. 2d 283, 285 (1958).

3rd Circuit: *Frederick Hart & Co.* v. *Recordgraph Corporation,* 169 F. 2d 580, 581 (1948)

4th Circuit: *Tahir Erk* v. *Glenn L. Martin Co.,* 116 F. 2d 865, 869 (1941)

5th Circuit: *Baldwin* v. *Morgan,* 251 F. 2d 780, 785 (1958)

6th Circuit: *Sherman* v. *Air Reduction Sales Company,* 251 F. 2d 543, 546-547 (1958)

7th Circuit: *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.,* 257 F. 2d 417, 418 (1958)

8th Circuit: *Warner* v. *First National Bank of Minneapolis,* 236 F. 2d 853, 857 (1956), *cert. denied,* 352 U.S. 927

9th Circuit: *Richfield Oil Corporation* v. *United States,* 248 F. 2d 217, 225 (1957)

10th Circuit: *Keenan* v. *Looney,* 227 F. 2d 878, 880 (1955).

2. Voluntary Payment

The decision that overpayments were voluntary is also in conflict with decisions of other circuits, holding that agreements making payments to the Government conditional are valid and binding.[27] And the consideration and determination of the voluntary payment issue, when no such defense had been pleaded, was patently erroneous and in conflict with decisions of this Court and of other circuits,[28] holding that courts may not decide cases on issues which the parties do not raise.

CONCLUSION

The Solicitor General has recognized the need for definitive determination of the time-bar issue and on three occasions has urged the granting of, or acquiesced in, petitions for certiorari.[29] The Second Circuit, to which other courts, faced with the same questions, are looking for resolution, is hopelessly divided and has

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[27] *Richfield Oil Corporation* v. *United States*, 248 F. 2d 217, 223-224 (9 Cir. 1957); *United States* v. *Ohio Oil Co.*, 163 F. 2d 633, 638 (10 Cir. 1947), *cert. denied*, 333 U.S. 833 (1948); *Empire Engineering Co., Inc.* v. *United States*, 59 C. Cls. 904 (1924); *In re New York O. & W. R. Co.*, 178 F. 2d 765, 766 (2 Cir. 1950).

[28] *Reynolds* v. *Stockton*, 140 U.S. 254 (1891); *Webster Eisenlohr* v. *Kalodner*, 145 F. 2d 316, 318 (3 Cir. 1944), *cert. denied*, 325 U.S. 867; *J. P. Jorgenson* v. *Rapp*, 157 Fed. 732, 738-739 (9 Cir. 1907); *Begert* v. *Payne*, 274 Fed. 784, 789 (6 Cir. 1921); *Osage Oil & Refining Co.* v. *Continental Oil Co.*, 34 F. 2d 585, 588 (10 Cir. 1929); *Tractor & Equipment Corporation* v. *Chain Belt Co.*, 50 F. Supp. 1001, 1006 (S.D.N.Y. 1942); *Bower* v. *Casanave*, 44 F. Supp. 501, 507 (S.D.N.Y. 1941).

[29] *Sword Line, Inc.* v. *United States* (No. 861, October Term, 1955); *American Eastern Corp.* v. *United States* (No. 934, October Term, 1955); *American-Foreign Steamship Corp.* v. *United States* and *Stockard Steamship Corp.* v. *United States* (Nos. 322 and 334, October Term, 1959).

failed to settle the issue. Its decision can lead only to confusion, further conflict and more litigation.

Accordingly, petitioners urge that certiorari be granted.

Respectfully submitted,

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August 18, 1961

APPENDIX A

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 126, 135, 214-225—October Term, 1956.

(Argued January 15, 1957
Original opinion filed September 25, 1957.)

(On rehearing before the court, *en banc*,
Decided July 28, 1958.)

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

No. 24190

AMERICAN-FOREIGN STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24200

STOCKARD STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24291

A. H. Bull Steamship Co., Bull-Insular Line, Inc., Baltimore Insular Line, Inc.,

Libelants-Appellants,

—v.—

United States of America,

Respondent-Appellee.

No. 24292

New York and Cuba Mail Steamship Company,

Libelant-Appellant,

—v.—

United States of America,

Respondent-Appellee.

No. 24283

Dichmann, Wright & Pugh, Inc.,

Libelant-Appellant,

—v.—

United States of America,

Respondent-Appellee.

No. 24284

POLARUS STEAMSHIP CO., INC.,

Libelant-Appellant

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24285

A. L. BURBANK & COMPANY, LTD.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24286

T. J. STEVENSON & CO., INC.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Nos. 24287 and 24289

NORTH ATLANTIC AND GULF STEAMSHIP CO.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24288

LUCKENBACH STEAMSHIP COMPANY, INC.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24400

BLIDBERG ROTHCHILD CO., INC.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Nos. 24401 and 24402

FALL RIVER NAVIGATION CO.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

CLARK, *Chief Judge*, MEDINA, HINCKS, WATERMAN and MOORE, *Circuit Judges.*

Consolidated appeals from orders of the United States District Court for the Southern District of New York,

Palmieri and Herlands, *JJ.*, finally dismissing for lack of jurisdiction libels to recover funds allegedly illegally retained by the Maritime Commission in its charter dealings with the libelants. Reversed as to all appeals except the Dichmann, Wright & Pugh, Inc. appeal, which is dismissed, and the dismissal of the sixth cause of libel of Blidberg Rothchild Co., Inc., which is affirmed.

J. Franklin Fort, Kominers & Fort, Washington, D. C. (John Cunningham, Israel Convisser and Edwin K. Reid, of counsel), *for all libelants-appellants except American-Foreign Steamship Corp.*

Of Counsel:

Burlingham, Hupper & Kennedy, New York, N. Y., *for North Atlantic & Gulf Steamship Co. and Luckenbach Steamship Co.*

Cravath, Swaine & Moore, New York, N. Y., *for New York and Cuba Mail Steamship Company.*

Hill, Betts & Nash, New York, N. Y., *for Dichmann, Wright & Pugh, Inc.*

Kirlin, Campbell & Keating, New York, N. Y., *for A. H. Bull Steamship Co., etc.*

Lester Levin, New York, N. Y., *for Polarus Steamship Co., Inc., A. L. Burbank & Co., Ltd., and T. J. Stevenson & Co., Inc.*

Zock, Petrie, Sheneman & Reid, New York, N. Y., *for Stockard Steamship Corp., Blidberg Rothchild Co., Inc., and Fall River Navigation Company* (Roberts & McInnis,

Washington, D. C., Francis J. O'Brien, Charles B. McInnis, and Roger H. Muzzall, of counsel, in Fall River Navigation Company).

Arthur M. Becker, Foley, James & Conran, New York, N. Y. (Becker & Maguire and Gerald B. Greenwald, Washington, D. C., of counsel), *for libelant-appellant American-Foreign Steamship Corporation.*

Benjamin H. Berman, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice (George Cochran Doub, Asst. Attorney General, Paul W. Williams, United States Attorney, S. D. N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., and William E. Gwatkin, III, Atty. Admiralty & Shipping Section, Department of Justice, on the briefs), *for United States of America.*

Hincks, *Circuit Judge*:

Pursuant to libelants' petitions after the filing of our first opinion in this case, this court on December 19, 1957 granted rehearing *en banc** which was limited to the question of determining the proper commencement date of the two-year statute of limitations of the Suits in Admiralty Act, 46 U. S. C. A. §745. Our earlier (unreported) opinion is hereby withdrawn.

Each of the libelants herein chartered ships from the Government pursuant to the Merchant Ship Sales Act, 50

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* Judge Lumbard has not participated in this appeal.

U. S. C. A. App. §1735 *et seq.*, and agreed to various terms of a standard charter, which made the rental price depend in part on the amount of the profit realized by the charterer. The libelants claim that the Maritime Commission, contrary to provisions of the Act, insisted on including in the standard charter provisions calling for excessive additional charter hire and these actions were brought under the Suits in Admiralty Act, 46 U. S. C. A. §741 *et seq.*, to recover such excess.

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims stated therein were barred by the two-year limitation of the Suits in Admiralty Act, 46 U. S. C. A. §745. As to this, the Government's position was that the causes of action accrued as of the time the libelants returned their ships to the Commission, and that this "redelivery" date in all cases was more than two years prior to the commencement of suit.

Judge Palmieri, in an opinion reported at 141 F. Supp. 58, dismissed all the libels, except those of Blidberg Rothchild and Fall River Navigation Co., and denied leave to amend because, however pleaded, the actions were time-barred.* Judge Herlands, in an unreported memorandum opinion, dismissed the Blidberg Rothchild and Fall River Navigation Co. libels for the same reason. The sole question presented on this appeal is whether it was correct to dismiss the libels and deny amendment because, for failure of timely institution of the actions, jurisdiction was lacking.

Before dealing with this question, we note that we are without appellate jurisdiction over the Dichmann, Wright & Pugh appeal. Dichmann, in its original reply brief, conceded that, since the second count of its libel was still pend-

* This action was required under the holdings of prior decisions of this court which will be discussed in this opinion.

ing in the District Court, its appeal from the dismissal of the first and third counts was interlocutory. It cited 28 U. S. C. A. §1292(3) as express statutory authority for us to entertain this appeal. But our authority to entertain interlocutory admiralty appeals is limited by the requirement of 28 U. S. C. A. §2107 that the appeal be filed within 15 days after entry of judgment. Here, the judgment appealed from was filed on May 22, 1956 and the appeal was not filed until August 10, 1956. The appeal therefore is too late, and must be dismissed. *The Fanny D* (*Eggers* v. *Southern Steamship Co.*), 5 Cir., 112 F. 2d 347, certiorari denied 311 U. S. 680; *Blaske* v. *Dick*, 7 Cir., 126 F. 2d 96, 98.

In the appeals which are properly before us, the following facts are pertinent to the issues raised. The Maritime Commission in 1946 was authorized by statute to charter vessels owned by the Government. The statute, 50 U. S. C. A. App. §1735 *et seq.*, provided for rental rates in §1738, which incorporated by reference §709(a) of the Merchant Marine Act, 46 U. S. C. A. §1199(a). This latter section provided that every charter executed by the Maritime Commission should contain provision that, whenever the charterer's adjusted profits exceed a certain amount, the charterer must pay as additional charter hire one-half of the profits in excess of a 10% return of employed capital. The Commission, claiming that §709(a) merely set a minimum additional charter hire, proceeded to charter its ships pursuant to charters, Clause 13* of which provided a

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* "CLAUSE 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washing-

sliding scale for the additional charter hire depending on the amount of profit per day in excess of the 10% return. Under these progressive rates the Commission was allowed to recapture as much as 90% of the profits in excess of $300 per day, per vessel, above the 10% return.

However, the libelants claim that before entering into such charters and before making payments thereunder they objected to the sliding scale rates as contrary to §709(a) and hence illegal; that by reason of their objections the Maritime Commission assured them that payments of additional charter hire would be deemed preliminary and subject to adjustment until final audit; and that, as a result of this understanding the final paragraph of Clause 13 was

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ton, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiscout) charter (prior to the times of payment provided for above or in such Warshipdemiscout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of such final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

inserted in the charters. In addition, the libelants claim that all parties to the charters operated under the assumption that, until final audit, charter hire payments were merely preliminary. In support of this position, they point to Commission regulations, 46 CFR §§299.31 (k) (1), 299.37-2 (a) (1), (2) and (b) (3), to instructions such as the one set out in the margin,* and to the Commission's routine procedure, established pursuant to instructions from the General Accounting Office, of depositing the additional charter hire in an "unearned money" account rather than in the "miscellaneous receipts" account required by statute, 50 U. S. C. A. App. §1745(d).

The Government now contends that Clause 13 of the charter is irrelevant to the limitations question and that the statute, of necessity, began to run on the date of payment with the result that all of the libels herein involving payments made before the date of redelivery are time-barred. The Government also argues that jurisdiction is lacking over libels for recovery of payments made after redelivery even if made within two years of suit because such payments as a matter of law were "voluntary" within the meaning of *Railroad Co.* v. *Commissioners*, 98 U. S. 541; *Cunard S.S. Co.* v. *Elting*, 2 Cir., 97 F. 2d 373. Since these contentions have been raised by exceptive allegations the Government, in reliance on comment in *The Ira M. Hedges*,

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* "Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise." (May 14, 1951 letter from Maritime.)

218 U. S. 264, 270, is contending that the voluntary character of the payments, for which recovery is sought, deprives the court of jurisdiction.* The libelants, on the other hand, have placed their reliance on Clause 13, and maintain that under that clause no breach of contract could possibly have occurred until, after "final audit," the Government refused to refund moneys claimed to be due the libelants. In the alternative, the libelants urge recovery on a mutual accounts theory according to which the statute of limitations would begin to run from the date of the last payment or credit entry in the account.

The issues before us have been presented to this court twice before, although in not such comprehensive and forthright manner as in the present case. In *Sword Line* v. *United States*, 2 Cir., 228 F. 2d 344, and in the opinion therein on rehearing, 230 F. 2d 75, affirmed on other grounds 351 U. S. 976,** the limitations issue, which had not been raised in the district court, was presented on appeal for the first time by the United States as appellee. This issue was one of three complex issues raised in the case. The court was in agreement in holding that the libelant's action had no merit because barred by a bankruptcy composition, but on the issue of limitations the majority, as pointed out on rehearing, held that the action accrued upon the date of the payment for which recovery was sought. 230 F. 2d at page 76. Judge Hand's mutual accounts approach was rejected. In *American-Eastern Corp.* v. *United States*, 133 F. Supp. 11, affirmed 2 Cir., 231 F. 2d 664, certiorari denied 351 U. S. 983, we relied upon the *Sword Line* ruling and affirmed the lower court without opinion.

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* For purposes of this opinion it is not necessary to pass upon this contention. We observe, however, that carried to its logical conclusion the contention is that every issue going to the merits is jurisdictional.

** As to the timeliness of the libels, certiorari was denied.

The panel of this court which delivered the original opinion on these appeals—the opinion now withdrawn—felt unwilling to depart from the authority of those cases. But now that the court on rehearing has undertaken to proceed *en banc*, we feel under somewhat less constraint from our past decisions and consider anew, on the intrinsic merits, the issues now before us.

We have come to the conclusion that the rights of the parties to these charters, so far as additional charter hire is concerned, are governed by Clause 13. This is not the case, frequently occurring, in which money has been collected by the Government by virtue of a statutory direction. The statute involved in this case does not of itself authorize or require payments to the Government. Title 46 U. S. C. A. § 1199(a) declares, "every charter made by the Commission • • • shall provide • • • • " Therefore, unless the parties enter into a charter there can be no liability created under § 1199(a). Accordingly, we must look to the charter and specifically to Clause 13 if we are to ascertain the rights and liabilities of the parties and evaluate the libelants' contentions that the Commission breached the charter and that the breach occurred not until it failed to return funds to the libelants after final audit and due demand.

When the libelants raised their contentions below, and in earlier cases, the Government's position was that Clause 13 was entirely irrelevant. Consequently, the Government never attacked the libelants' asserted interpretation of that clause: it filed no answers and its exceptive allegations raised no issues of fact. On this rehearing, however, for the first time the Government argues that even if Clause 13 is controlling on the limitations issue the libelants are misinterpreting the language of that clause: it now for the first time suggests that "each final audit" in Clause 13 means *each annual audit*. But this dispute as to interpre-

tation is plainly one that now appears to involve questions of fact on which extrinsic evidence is admissible. The parties never had occasion to present such evidence. And the particular problem of interpretation has never been passed upon by any judge in these cases or in any other that has been brought to our attention.

As to the interpretation of Clause 13 and its effect upon claims for the recovery of additional charter hire, we have been presented on appeal with many arguments based on facts alleged in briefs and affidavits, some but not all of which were part of the record below. But since the issue was not raised below, probably because the Government thought it irrelevant under the *Sword Line* decision, we think the cases should be remanded and the issue should be submitted to the trial judges for findings and determination after giving the Government opportunity to raise such issues of fact as may be desired. This is a case in which parol evidence is admissible on the disputed issue as to interpretation of the charters, Corbin on Contracts, Vol. 3, §579, and we think we should wait until the relevant record of fact below has been made and completed before we commit the court to any particular interpretation. Our preview, on this appeal, of the contentions of the parties as to Clause 13 leads us to suggest that issues framed thereby are peculiarly appropriate for determination on such evidence as the parties may offer rather than on affidavits. *Pacific-Atlantic Steamship Company* v. *United States*, D. Del. 1955, 127 F. Supp. 931. Of course the burden of proving jurisdiction remains throughout on the libelants. *Corporation of The Royal Exchange Assurance* v. *United States*, 2 Cir., 75 F. 2d 478. But we think the text of Clause 13 is an adequate, *prima facie*, showing of jurisdiction in the absence of pleading and proof by the Government that the libelants' interpretation of Clause 13 is incorrect.

The true intent of Clause 13 having been ascertained, it can then readily be determined whether these suits in so far as they seek recovery of additional charter hire have been brought within the two-year limitation. And any suit thus found to have been timely brought should then, of course, be heard and decided on the merits.

Certain of the libels also include claims not directly based upon the asserted illegality of the progressive rate of additional charter hire under Clause 13. Thus, it is alleged that the Commission, for accounting purposes, improperly split the year 1947 into two segments which had the effect of unduly increasing the libelants' charter hire liability. The Commission's construction of the cumulative accounting provision is also asserted to have improperly increased the libelants' charter hire liability. One libelant asserts that the phrase "capital necessarily employed" as used in Clause 13 has been incorrectly determined with the result that its charter hire liability has been overstated. Another libelant asserts that the Commission improperly reduced its overhead expense, thereby increasing its charter hire liability, by offsetting certain management fees it had received and by refusing inclusion of certain post redelivery overhead expenses in "the charterer's fair and reasonable overhead expenses applicable to operation of the vessels" as provided in the first paragraph of Clause 13. Two libelants contend that their charter hire liabilities were improperly increased by the refusal of the Commission to allow the inclusion of certain expenses for agency fees in the overhead expense figure envisioned by the extract from Clause 13 just above quoted. Every one of these claims relates solely to the proper computation of additional charter hire and has no independent basis. We hold that these claims should be dealt with in the same manner as the basic claim for recovery of excessive charter hire. For

all were reserved by Clause 13 until "final audit" whatever that term shall be determined to mean.

A different situation, however, prevails with regard to Blidberg's claim for refund of expenditures for latent defects existing at the time the vessels were delivered on charter as contained in its sixth cause of libel. Such a claim does not come within the express provision of Clause 13 which reserves disputes concerning "additional charter hire." The accrual of this claim, therefore, was not deferred until the final audit and consequently it is time-barred. *Isthmian Steamship Co.* v. *United States*, D. C. S. D. N. Y., 146 F. Supp. 219. *Alcoa Steamship Co.* v. *United States*, D. C. S. D. N. Y., 94 F. Supp. 406. However, this item, though not directly recoverable, may indirectly affect the proper computation of Blidberg's additional charter hire. To the extent that this is so, it may be necessary to litigate this expense for its impact on a proper computation of Blidberg's additional charter hire even though direct recovery of the expense be time-barred.

To the extent that *Sword Line* and *American-Eastern* are inconsistent with rulings indicated above, they are overruled.

The appeal of Dichmann, Wright & Pugh, Inc. is dismissed. All other decrees appealed from are reversed and the suits are remanded for further proceedings in accordance with this opinion, except that the dismissal of Blidberg's sixth cause of libel is affirmed.

WATERMAN, *Circuit Judge* (dissenting):

I concur with the majority that the purported appeal in No. 24283, *Dichmann, Wright & Pugh, Inc.* v. *United States*, should be dismissed for lack of appellate jurisdiction.

With respect to the issues relative to jurisdiction that the majority find to have been raised in the other thirteen cases and which in their judgment require remand to resolve, I concur in the dissenting opinion of Judge Clark. I would hold, with him, that the respective written instruments in each case, all of which contain the identical Clause 13, need no further judicial consideration below to make them properly interpretable, and that the interpretation placed upon these charter-parties in his dissent is a proper and justifiable one. I believe we should decide now, without more, whether these cases, case by case, are so time-barred as to deprive the courts of any jurisdiction over the respective alleged causes of action, and in the course of so doing I would follow our previous holdings in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344 (2 Cir. 1955), *affirmed on rehearing*, 230 F. 2d 75 (2 Cir. 1956), *affirmed*, 351 U. S. 976 (1956), and in *American Eastern Corp.* v. *United States*, 231 F. 2d 664 (2 Cir. 1956), *cert. denied*, 351 U. S. 983 (1956). When the libels were dismissed below for lack of jurisdiction libelants moved to amend the dismissed libels in order to present additional grounds to justify the taking of jurisdiction. See *A. H. Bull S.S. Co. et al.* v. *United States*, 141 F. Supp. 58, 59-60. Not only were the libels severally dismissed below, but the motions to amend were severally denied; and appeals from the dismissals and the denials of the motions to amend were then taken. What is gained by not taking up these rulings now? Since it is my belief that the rulings below in these thirteen cases were in all respects proper, I would affirm the decisions of Judges Palmieri and Herlands below.

CLARK, *Chief Judge* (dissenting):

Despite many years on the bench I have still to find an acceptable formula for appellate disposition of a case

where the adjudication below gives concern, but falls short of clearly demonstrable error. Of this at least I do feel sure, that a court of review should not attempt to relieve itself of responsibility—get itself off the hook—by merely remanding, i.e., passing the buck back, to the trial court. It should remand only when it has a clear concept of what the trial judge can do to advance the case to final adjudication and precisely states that for his benefit and the benefit of the litigants thus subjected to tantalizing delay.

These basic requirements seem to me quite unfulfilled in the decision herewith. The mandate is merely for remand "for further proceedings in accordance with this opinion." The opinion proper has some further vague suggestions or directions for the "framing" of issues—apparently many of them—and for the taking of testimony—evidently extensive and unlimited—as to each. But the opinion itself demonstrates by the controlling force it gives to Clause 13 of the charters that there is really but a single issue, namely, the interpretation of a written instrument. And on this the record is already complete and the case ripe for final ruling. More precisely stated the issue is whether Clause 13 can be interpreted to control and set aside the normal rule—relied on in our earlier rulings on the issue[1]—that on a quasi-contractual claim for refund of payments asserted to have been erroneously made the right of action accrues and the period of limitation begins to run from the time of the payments. Indeed, the whole tenor of the decision seems to be that, since limitation restrictions are harsh, we must search assiduously—and ask for trial court help thereto—for means to interpret a contract of seemingly different pur-

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1 *Sword Line, Inc.* v. *United States*, 2 Cir., 228 F. 2d 344, affirmed on rehearing 230 F. 2d 75, affirmed 351 U. S. 976; *American Eastern Corp.* v. *United States*, D. C. S. D. N. Y., 133 F. Supp. 11, affirmed 2 Cir., 231 F. 2d 664, certiorari denied 351 U. S. 983.

port to achieve that end. In taking this rather unusual course my brothers give short shrift to the views of many district judges and of two different panels of this court, whose adjudications the Supreme Court refused to disturb. I think the explanation proffered is inadequate for its task.

To understand what is happening we must consider the state of the existing record before remand. What we are dealing with is a "built-in" statute of limitation forming a very direct boundary to the grant of remedy against the sovereign. 46 U. S. C. §745. This is important in several ways. It shows the strong legislative policy against stale claims against the government. It clearly places the burden of proof upon the claimants to show that they properly come within an unrestricted class. And since it thus vitally delimits the court's jurisdiction, it makes appropriate and normal the usual processes for the testing of issues of federal jurisdiction, as actually had here, namely, motion and affidavit.[2] In short it was incumbent upon the libelants to demonstrate by their affidavits that their libels were timely or, as applied to the issue here, that the negotiations for and background of the charters showed the correct interpretation of Clause 13 to be one for extending the time of suit. And this they attempted with at least a wealth of material, however pertinent it may be thought to be.

It is, indeed, a reflection upon able and shrewd counsel to believe that, faced with the legal requirement and practical

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2 *Land* v. *Dollar*, 330 U. S. 731, 735; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278; *Central Mexico Light & Power Co.* v. *Munch*, 2 Cir., 116 F. 2d 85; *Williams* v. *Minnesota Min. & Mfg. Co.*, D. C. S. D. Cal., 14 F. R. D. 1; *Ramirez & Feraud Chili Co.* v. *Las Palmas Food Co.*, D. C. S. D. Cal., 146 F. Supp. 394, 397, affirmed *Las Palmas Food Co.* v. *Ramirez & Feraud Chili Co.*, 9 Cir., 245 F. 2d 874, certiorari denied 355 U. S. 927; and see full discussion in 6 Moore's Federal Practice ¶56.03, pp. 2027, 2028 (2d Ed. 1953), also 5 id. ¶38.36, pp. 290-292 (2d Ed. 1951), 2 id. ¶12.09, pp. 2248-2250, 2256, ¶12.14 (2d Ed. 1948).

necessity of disclosure, they should have held back relevant and convincing material. One of the more confusing aspects of the decision is that it is not clear how far it is intended to repudiate the normal procedure for testing issues of federal jurisdiction as shown by the cases cited in my footnote 2 *supra*. In any event we cannot expect miracles of counsel; anything more they bring to a new trial will be only cumulative to what is already before us. Obviously were there oral evidence of direct statements of intent on the part of the negotiators now presently remembered (none has been suggested), such evidence could not be used to control or vary the written document. All the material useful for decision is actually at hand; I do not see why my brothers do not employ it for final adjudication that jurisdiction exists if such is the way they feel they must go. The obstacles will not be any the less after two or three more years of protracted litigation.

That this is their direction is, I think, to be fairly deduced from the opinion, even though the discussion therein is limited. Not only does it accept the text of Clause 13 as "an adequate, *prima facie*, showing of jurisdiction," but it takes the highly drastic and quite confusing course of overruling out of hand our two previous rulings to the contrary cited in my note 1 *supra*. What reason is there for overruling *Sword Line* and *American Eastern* if eventually they may be held correctly decided? Indeed, in the present state of division in the court, what reason or effect is there to this declaration in any event?[3]

Let us look more closely at this "prima facie" ruling. In interpreting the writing we must start with the congressional policy disfavoring stale claims. I see no reason here for exceptional treatment. The contracts were made,

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3 It is made by a minority only of the active judges, against the expressed view of other judges who may ultimately prevail. An overruling so deficiently based can only mislead the unwary.

the services performed, and the payments made a decade or more ago. And what is more, the ships were actually returned to the government, thus entirely closing the transactions, almost a decade ago. It is especially strange, if these were live issues where the government was expected to make vast refunds, that some of the rental payments were actually made after the ships were returned.[4] One can understand belated payments by the charterers if they thought the hire was actually due, but hardly if they were preparing to claim that there had already been gross overpayment. If ever stale claims against the government are to be viewed with a jaundiced eye, these would seem to be the occasion.

Turning now to Clause 13 itself—quoted in full in the opinion—it should be noticed that it is not a provision for claim adjustment; nor does it in any way suggest that it was meant to deal with the processing of claims for refund. Clearly it is what it is labeled as being, namely, a provision for "Additional Charter Hire." It follows naturally after Clause 12, covering "Basic Charter Hire," and in its main section provides a scale for such additional hire based on cumulative net voyage profits of the charter in any *calendar year.* The emphasis on yearly accountings is obvious. The particular provisions here in issue come at the end and deal with preliminary and final payments of such additional charter hire, based on the scale stated. So a method is provided whereby the government can ask and receive preliminary payments as the money is earned, and the "final audits" clearly refer to the yearly settlements thus made necessary. Quite simply they are necessary because the progressive rate of additional hire depends on the amount of cumulative profits *for the year.* They just do

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4 Some of the payments were actually made within the two-year limitation; while these are not separately noted in the opinion, they seem barred as voluntary payments.

not fit the concept of an ultimate and probably long delayed settlement of all disputes which might conceivably arise under any of the manifold provisions of these extensive charters. Significantly a much later charter provision does look to such possibility, thereby affording a persuasive contrast. For Clause 28 deals with "Accounting, Report and Supervision" and requires the keeping of books, the filing of financial statements, and the like, covering all transactions, while it also authorizes the auditing of all books and the maintenance of checks and controls of expenditures and revenues in connection with the operation of any of the chartered vessels.

In the final paragraph of Clause 13 the preliminary statements therein referred to are correlated with the final audit. This places a well-nigh insuperable obstacle in the way of the interpretation claimed by libelants. For the "adjustment" visualized is to be had "either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner"; the idea is carred further thus, "at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required." Each final audit therefore serves a function of settling the payments due on each calendar year's profits. Thus it fits properly with the rest of the clause. It cannot be made to mean some final settlement of all and sundry differences a decade or more hence when at length both parties are prepared to have a balance struck. Thus the government's brief is correct in saying: "Thus the charterers' right to file a claim for adjustment and refund of an overpayment of additional hire *and to bring immediate suit if refund was not made* is precisely the same at the time of a charterer's rendition of its preliminary accountings and at the time of the owner's final audit."

This natural construction is supported by various Maritime Administration regulations which (1) require the charterer at the end of each calendar month to pay 90 per cent of the additional charter hire then indicated to be due, 46 CFR 299.31(k)(1); (2) provide that such payments are preliminary and subject to adjustment upon completion of audit by the government covering the period involved (the calendar year), *id.*; (3) provide that tender of the monthly payments and their acceptance do not prejudice rights under the charter or otherwise, *id.*; (4) require remittance of monthly payments to be accompanied by a preliminary statement, 46 CFR 299.31(k)(2); (5) provide that if this statement indicates that 90 per cent of the cumulative total for the expired portions of the periods involved (calendar year) is less than the total of payments theretofore made for the period the charterer may apply for a refund, 46 CFR 299.31(k)(5); and (6) require each charterer to submit a separate final accounting of additional charter hire for each annual or over-all accounting period [which under 46 CFR 299.37-1(h) and (i) is defined as a calendar year or a period less than a calendar year, 46 CFR 299.37-2(b)]. Hence, simply put, Clause 13, read with the regulations, provides that the charterers must make monthly payments on account of the additional charter hire which are preliminary because only upon the rendition of preliminary statements or upon final audit for the year will the parties know whether or not the amounts of the monthly payments were correct.

Neither in wording nor in practical operability, however, is the Clause appropriate for the adjustment of the type of "overpayment" here involved. For the charterers knew that as they read the law the sums here claimed were not correct even when remitted. So there is no suggestion anywhere in the contract that the earlier language in

Clause 13 bears on these "overpayments" in any way. Nor is there any suggestion in Clause 13 or in the regulations that the preliminary payments are tentative because the charterers believed the Clause to be illegal or that the parties agreed to put off a judicial determination of the legality of the rates. It is a strange contract which would preclude suit by the charterers to reform the contract or to recover the specific monthly "overpayments" if actually illegal. But, as the opinion herewith makes clear, libelants to succeed must rely on such an interpretation, viz., that the phrase "each final audit" can mean only some type of closing-out accounting which ultimately and finally terminates all relations between the charterers and the United States. I submit with all deference that the mere statement of the argument betrays its weakness; without fairly conclusive support somewhere for such a reading there is no "prima facie showing of jurisdiction." Surely the parties did not intend an agreement to require the deposits of huge sums of money for an indefinite time pending determination of the legality of the contract rates. For quite clearly the period of limitation can start only when the parties agree and are content that they have eventually obtained an ultimate closing-out accounting. Ironically enough, since even late deposits are to be included, there is nothing to prevent the charterers from continuing to make the government a good and safe depositary, paying better than market rates of interest, for their excess funds. Hence for my part I cannot accept this as permissible interpretation against respondent's persuasive showing (wholly consistent with both the charters and the regulations) that "each final audit" means an audit of the charterers' *yearly* profits.

It is true that the libelants ably and ingeniously develop various arguments from the background material in an endeavor to combat this analysis. Doubtless they will

fashion others if allowed to prolong the proceedings. But the very ingenuity exercised, viewed against the results achieved, suggests how pressing is their need for an argumentative support which they still find lacking. It hardly seems worth while now to discuss these arguments at length beyond a general suggestion of their weakness. They deal either with supposed inconsistencies with the government's present position, such as segregation of accounts or the like, or with claimed admissions by the Maritime officials. The principle against waiver of public rights by government officers would make these dubious in any event; but even more important is the fact that the inconsistencies or waivers are apparent only to those predisposed to see them. They obviously did not occur to the officials at the time. Unconscious waiver of public rights is not a legal principle to be pressed far.

The opinion states that the government for a considerable time concealed its present and ultimate contention. That charge, if important, does not seem to me to be sustained on the record. Appellants have vacillated in the theories they would rely upon, and seemingly have come to a choice of Clause 13 only recently. As the case developed there was not early occasion for the government to be more specific in its opposition (which has always been steady and continuous) than it has been. And its position has been reasonably well known, as was apparent in the earlier cases before us. So Judge Walsh, ably analyzing these points in the trial court in the *American Eastern* case, D. C. S. D. N. Y., 133 F. Supp. 11, 16 (cited in note 1 *supra*), well concludes:

> "The labyrinthine aspects of the charter and regulations which libelant has seen fit to exaggerate are really only superficial. They are to be expected in any administrative attempt to deal with a complex subject

matter on a mass scale. Care must be taken not to permit their seeming complexity to confuse the elementary simplicity of the dealings between the parties."

In any event the point cannot be of controlling importance, since we have now come quite completely to the point where we enforce justice and the law, notwithstanding possible deficiencies in presentation by the lawyers.[5]

Consequently I must conclude that the procedure here does not require, but indeed makes anomalous, any further trial or delay in adjudication. The case is ripe for final settlement, which should now be had, of the jurisdiction issue. And any termination which does not follow the simple course stated in *Sword Line* and applied in *American Eastern* runs into serious difficulties, as resting upon a strained interpretation of a written instrument. Here some note should be taken of our procedure. These cases were originally argued on January 15, 1957. The process of decision, particularly the rehearing *in banc,* has delayed action now for a year and a half, and the end is of course not yet in sight. I fear nothing has been achieved by the delay but the accentuation of our differences, with no progress toward their adjustment. Had the case been terminated by February 1957 by decision of the original panel, with a concise statement of our disagreement—a matter of interest, which the public is entitled to know—but without attempting the supposed, though illusory, reconciliation of views to be obtained by a hearing *in banc,* every one, it seems, would have profited.

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5 See, e.g., *United States* v. *Bess*, 78 S. Ct. 1054; *Trop* v. *Dulles*, 356 U. S. 86, reversing 2 Cir., 239 F. 2d 527; *Vibra Brush Corp.* v. *Schaffer*, 2 Cir., May 13, 1958; *Columbia Research Corp.* v. *Schaffer*, 2 Cir., May 13, 1958; *Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance* v. *Delaware, L. & W. R. Co.*, 2 Cir., 157 F. 2d 417, 420; *Massachusetts Bonding & Ins. Co.* v. *State of New York*, 2 Cir., July 11, 1958.

Hence I would affirm the decisions reached below by able district judges in accordance with views heretofore expressed by this court. I should add that of course I do not object to the dispositions made of certain libels not presenting the main issue. But as to this issue, since there would seem a distinct possibility of its going higher—in view of its great importance involving, *inter alia*, the premature and undefined overruling of previously settled precedents—I do feel an obligation to mention the further question here definitely presented as to the effect of a vote by a judge retired from regular active service under 28 U. S. C. §371(b) upon an appeal which has been ordered heard *in banc*. The question arises because the governing statute 28 U. S. C. §46(c) says: "A court in banc shall consist of all active circuit judges of the circuit"; and Judge Medina, whose vote is here decisive, took advantage of the retirement provisions of 28 U. S. C. §371(b) on March 1 last. I do not like to raise the question (which obviously can be settled only by the Supreme Court or by corrective legislation) because I have been active in inducing retired colleagues to sit and because I regard their continued participation in cases committed to their consideration desirable and beneficial all around. And I think this conclusion also applies to retired District Judge Leibell, who sat on the original panel herein which voted for affirmance. But the matter has caused doubt and uncertainty in other cases we have had, and a definitive answer is urgently desirable.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 202-215—October Term, 1960.

(Argued December 8, 1960 Decided May 26, 1961.)

Docket Nos. 24190, 24200, 24291, 24292,
24283-24289, 24400-24402

AMERICAN-FOREIGN STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

STOCKARD STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

A. H. BULL STEAMSHIP CO., BULL-INSULAR LINE, INC.,
BALTIMORE INSULAR LINE, INC.,

Libelants-Appellants,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

DICHMANN, WRIGHT & PUGH, INC.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

POLARUS STEAMSHIP CO., INC.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

A. L. BURBANK & COMPANY, LTD.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

T. J. Stevenson & Co., Inc.,

Libelant-Appellant,

—v.—

United States of America,

Respondent-Appellee.

North Atlantic and Gulf Steamship Co.,

Libelant-Appellant,

—v.—

United States of America,

Respondent-Appellee.

Luckenbach Steamship Company, Inc.,

Libelant-Appellant,

—v.—

United States of America,

Respondent-Appellee.

Blidberg Rothchild Co., Inc.,

Libelant-Appellant,

—v.—

United States of America,

Respondent-Appellee.

FALL RIVER NAVIGATION CO.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Rehearing before the Court, *in banc.*

Before:

CLARK, WATERMAN, MOORE, FRIENDLY and SMITH,
Circuit Judges.

Suits against the United States to recover alleged overpayments of charter hire made to Maritime Commission. The United States District Court for the Southern District of New York, Edmund J. Palmieri, *J.*, 141 F. Supp. 58, and William B. Herlands, *J.*, entered orders finally dismissing the libels for lack of jurisdiction, and libelants' appeals were consolidated. Decision of this court on rehearing *in banc,* 265 F. 2d 136, was vacated and remanded to this court for further proceedings, 363 U. S. 685, and argued before the court *in banc* December 8, 1960.

One appeal dismissed; dismissal of five causes of libel affirmed; reversed and remanded as to all other appeals.

J. FRANKLIN FORT, Kominers & Fort, Washington, D. C. (John Cunningham, and Israel Convisser, Washington, D. C., of counsel), *for all libelants-appellants except American-Foreign S.S. Corp.*

BURLINGHAM, HUPPER & KENNEDY, New York City, of counsel, *for North Atlantic & Gulf Steamship Co. and Luckenbach Steamship Co.*

CRAVATH, SWAINE & MOORE, New York City, of counsel, *for New York & Cuba Mail S.S. Co.*

HILL, BETTS & NASH, New York City, of counsel, *for Dichmann, Wright & Pugh, Inc.*

KIRLIN, CAMPBELL & KEATING, New York City, of counsel, *for A. H. Bull S.S. Co., etc.*

LESTER LEVIN, New York City, of counsel, *for Polarus S.S. Co., Inc., A. L. Burbank & Co., Ltd., and T. J. Stevenson & Co., Inc.*

ZOCK, PETRIE, SHENEMAN & REID, New York City, of counsel, *for Stockard S.S. Corp., Blidberg Rothchild Co., Inc., and Fall River Nav. Co.* (Roberts & McInnis, Washington, D. C., Francis J. O'Brien, New York City, Charles B. McInnis, and Roger H. Muzzall, Washington, D. C., of counsel), *for Fall River Nav. Co.*

ARTHUR M. BECKER, Washington, D. C., Foley, James & Conran, New York City (Becker & Maguire and Gerald B. Greenwald, Washington, D. C. of counsel), *for libelant-appellant American-Foreign S.S. Corp.*

LEAVENWORTH COLBY, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C. (George Cochran Doub, Asst. Atty. Gen., and S. Hazard Gillespie, Jr., U. S. Attorney, S. D. N. Y., New York City, on the briefs), *for the United States.*

SMITH, *Circuit Judge*:

The instant case presents fourteen consolidated appeals. The appellants are in all cases shipping concerns whose actions against the United States under the Suits in Admiralty Act, 46 U. S. C. §741 *et seq.*, have been dismissed in the District Court for the Southern District of New York as time-barred.[1] On appeal to this court, a panel composed of Circuit Judges Hincks and Medina and Retired District Judge Leibell affirmed the dismissal of the libels, *American-Foreign Steamship Corp. et al.* v. *United States*, 265 F. 2d 136 (2 Cir. 1957), on the authority of *Sword Line, Inc.* v. *United States*, 228 F. 2d 344 (2 Cir. 1955), aff'd on rehearing 230 F. 2d 75, aff'd as to admiralty jurisdiction 351 U. S. 976 (1956), and *American Eastern Corp.* v. *United States*, 133 F. Supp. 11 (S. D. N. Y. 1955), aff'd 231 F. 2d 664, cert. den. 351 U. S. 983.

That panel, however, indicated that, were it not for the aforementioned two recent decisions by other panels of this court, it might well pass differently on the limitations question. Petition for reargument *in banc* was granted and the case was heard again by the then active Circuit Judges, Chief Judge Clark, and Judges Medina, Hincks, Moore and Waterman.[2] A majority of that court rejected the *Sword Line* and *American Eastern* cases and held that the libels had been improperly dismissed. The causes were ordered remanded for further factual inquiry to determine whether

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1 Judge Palmieri, in an opinion reported in 141 F. Supp. 58 (1956), dismissed all of these libels except those involving Blidberg Rothchild Co., Inc. and Fall River Navigation Company. Judge Herlands dismissed the libels concerning those companies in an unreported memorandum cited verbatim in *American-Foreign Steamship Corp., et al.* v. *United States*, 265 F. 2d 136 (2 Cir. 1957), at page 140, fn. 2.

2 Present Chief Judge Lumbard at that time, as now, disqualified himself because of prior contacts with the cases during his tenure as United States Attorney for the Southern District of New York.

the parties had agreed, in Clause 13 of the bareboat charters, to postpone suits on *all* questions until after final audit of the charters—thus suspending operation of the time-bar. Judges Waterman and Clark dissented, being of the opinion that Clause 13 clearly did not postpone the running of the limitations period and that *Sword Line* and *American Eastern* were correctly decided; Judge Clark, in his dissent, further questioned, under the wording of 28 U. S. C. §46(c), the right of Judge Medina (who had retired from regular active service under the provisions of 28 U. S. C. §371(b) between the time of the submission of the appeals to the court *in banc* and the date of the decision in the case) to cast a vote on the *in banc* court.

After the denial of a petition for rehearing, the Supreme Court granted certiorari only on the question of Judge Medina's interim retirement, 361 U. S. 861 (1959). That Court held, per Justice Stewart, that he had not been eligible; it vacated the *in banc* decision and remanded to this court for further proceedings, intimating "no view as to the merits of the underlying litigation." 363 U. S. 685 (1960).

Although the factual background of these disputes has been recorded in the course of former voyages through this court, it will be helpful to attempt once again to place these facts in proper perspective. During the Second World War the United States Government, not surprisingly, had a virtual monopoly on the ownership of all floating vessels. It used the facilities of the existing civilian maritime industry with those ship operators acting generally as managerial agents for the United States. After the termination of hostilities the government moved to get out of the general maritime industry in favor of the civilian commercial operators. Starting in early 1946 the War Shipping Administration began chartering many war-built vessels under

a form of bareboat charter agreement known as "Warshipdemiseout Form 203." By the Act of Congress of June 8, 1946, Section 202, 60 Stat. 481 at 501, the War Shipping Administration was abolished effective September 1, 1946 and its functions transferred to the Maritime Commission (Maritime). In August, Maritime announced its intention to cancel all Warshipdemiseout 203 charters as of August 31, 1946—and to substitute a new form of charter, "Shipsalesdemise 303," which was chiefly distinguished from its predecessor by a sliding scale for the payment of "additional charter hire" geared to the profits of the charterers. Whereas the earlier charter had provided for a flat 50% government charge on profits in excess of a 10% return on capital, "303" provided for the payment to Maritime of up to 90% of the excess profits.

Appellants, singly and through their trade association, protested the imposition of this sliding scale for "additional charter hire," alleging that Maritime's action was illegal and outside the scope of its statutory authority under section 5(a) and (b) of the Merchant Ship Sales Act of 1946, 50 U. S. C. App. §1738 and §709(a) of the Merchant Marine Act of 1936, 46 U. S. C. §1199(a). Nevertheless, they all signed the new charters calling, in Clause 13, for the sliding scale on profits in excess of 10% of capital necessarily employed. The disputed Clause 13, after making provision for the graduated rates, stated:

> "The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner;

provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

Although by far the largest claims of these applicants concern the repayment of allegedly illegal additional charter hire,[3] there are many other claims pressed, some of them quite substantial. One is based on the alleged unauthorized insistence by Maritime that 1947 be split into two separate accounting years because of the insertion of a "foreign trade addendum" into the charters.[4] There are disputes on the interpretation of the charters concerning the availability of certain cumulative accounting methods involving the disallowance by Maritime of "loss carry-backs."[5] Finally, there are diverse claims involving the disallowance of specific expenditures involved in the computation of the basic and additional charter hire paid Maritime. These include disagreements over "capital necessarily employed,"[6] the disallowance of certain alleged post-redelivery overhead expenses,[7] management fees,[8] and

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3 All charterers save Luckenbach press claims based on the sliding scale for additional charter hire.

4 Pressed by Blidberg, Burbank, Luckenbach and Norgulf.

5 Blidberg, Bull, Burbank, Luckenbach, New York & Cuba Mail and Norgulf.

6 Asserted by Polarus.

7 By Blidberg.

8 By Blidberg.

agency fees.[9] Blidberg alone asserts a claim against the government for recovery of expenses incurred because of claimed latent defects present in certain vessels at the time the government handed them over to the charterer.

Because of the consolidation of so many causes in this appeal, the relevant time factors are somewhat incomplete on the record. It is agreed, however, that in all cases the libels were instituted more than two years after the redelivery dates of the last vessel, i.e. the time of termination of active operation under the charters. Similarly, it is undisputed that all actions were begun within two years of "final audit." Some of the charterers had made substantial payments on additional charter hire within two years of instituting their libels; others had not.

The claims advanced by appellants fall into two broad categories. The first embraces those disputes involving the claimed illegality of Maritime's actions. This includes both the additional charter hire rates geared to the amount of the charterers' profits, and the foreign trade addendum —with the resultant split 1947 accounting forced upon appellants in that addendum. In the second category of claims, appellants do not challenge the power of Maritime to insist upon certain contractual terms. These disputes involve the construction and interpretation of the charters as regards proper deductions and expenditures and methods of cumulative accounting. Because of the basic difference between these two types of controversy, different application of the time-bar is justifiable and warranted.

The limitations section of the Suits in Admiralty Act, 46 U. S. C. §745, is significant for a number of reasons. The fact that the limitation on actions is "built-in" to the statute makes the time-bar a sharp jurisdictional limitation on suits not timely brought under the Act. *Osbourne* v.

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9 By Bull.

United States, 164 F. 2d 767 (2 Cir. 1947); *Desmond* v. *United States*, 105 F. Supp. 9 (S. D. N. Y. 1952), rev'd in part on other grounds, 217 F. 2d 948 (2 Cir. 1954), certiorari denied 349 U. S. 911; *Burch* v. *United States*, 163 F. Supp. 476 (E. D. Va. 1958); see also *Soriano* v. *United States*, 352 U. S. 270 (1957). It also evinces a clear Congressional policy frowning upon stale claims against the government. In the case of contract claims against the United States, Congress has decreed that, in admiralty actions, even mildly stale claims are not to be brought. This is apparent when the two year time-bar period of section 745 is compared with the six year limitation period applying generally to suits against the United States, 28 U. S. C. §2401, or with general state limitation statutes applying to contract actions which invariably allow a much longer period to bring suit. See Gen. Stats. Conn. (1958 Rev.) §52-576; N. Y. Civ. Prac. Act, §48; Texas Civ. Stats., Art. 5527, 5529; Cal. Code Civ. Pro., §337; Ill. Rev. Stats., Chapt. 18, §17. The time limitation imposed by the statute must be strictly construed to effectuate the Congressional policy so announced. *McMahon* v. *United States*, 342 U. S. 25 (1951).

Section 745 states, "Suits • • • may be brought only within two years after the cause of action arises." As to the category of disputes centering on the "illegality" of Maritime's actions—the sliding scale for additional charter hire and the split-1947 accounting—the causes of action "arose" at the time the charterers reluctantly signed the questioned agreements. Appellants had protested the inclusion in the charters of both those clauses. Since it was immediately apparent that deposit of large sums would be required under those provisions, the controversies were ripe for action. Charterers could have brought suit in the District Court for a declaratory judgment to determine

the legality of the disputed clauses within two years of signing the agreements. See the dictum of the Third Circuit in a very similar case, *American President Lines* v. *United States*, 162 F. Supp. 732, 739 (D. Del. 1958), aff'd 265 F. 2d 552 (3 Cir. 1959). Although declaratory judgment procedure is apparently not often used in admiralty, it has been recognized that it is available. *Leonard* v. *Liberty Mutual Insurance Co.*, 165 F. Supp. 154 (E. D. Pa. 1958), rev'd on other grounds 267 F. 2d 421 (3 Cir. 1959); *Longview Tugboat Co.* v. *Jameson*, 218 F. 2d 547 (9 Cir. 1955); *Sun Oil Co.* v. *Transcontinental Gas Pipe Line Corp.*, 108 F. Supp. 280 (E. D. Pa. 1952), aff'd 203 F. 2d 957 (3 Cir. 1953).

The Suits in Admiralty Act does not specifically sanction declaratory relief against the United States. However, nowhere in that statute is there any indication that the significant reforms *later* introduced by the Declaratory Judgment Act, 28 U. S. C. §§2201, 2202, should not be applicable to admiralty courts and to libels in admiralty against the government. Furthermore, the wording of the Declaratory Judgment Act makes it broadly applicable to "any court of the United States" which would include, presumably, the admiralty courts. Declaratory relief was also available to appellants under the terms of the Administrative Procedure Act, 5 U. S. C. §§1001-1009. Maritime is surely an "agency" within the scope of section 1001(a)—and section 1009(a), (b) and (c) would appear to have given appellants the opportunity to challenge the legality of Maritime's actions.

It may be rather harsh to hold that the charterers are now completely foreclosed for failure to attempt one of those aforementioned courses—which may have been anything but clear at that time. Nevertheless, even if it cannot be said that appellants had a "cause of action" imme-

diately after signing the agreements, a cause of action did arise immediately upon the payment of additional charter hire in excess of 50% of profits—or when preliminary payments were made on the 1947 split-year accounting system. Although the exact dollar amount in issue was open to modification by the effect of profits or losses in later accounting years—or by other supervening disputes over allowable expenses and the like—there nonetheless was a claim, sufficiently liquidated to support a suit, after each overpayment. The charterers had still another path clearly open to them which would have protected their rights; they could have refused to pay charter hire in excess of 50%—and forced the United States to sue them for the difference. See *United States* v. *East Harbor Trading Corporation* (S. D. N. Y. December 29, 1960).

Since the built-in time-bar of the Suits in Admiralty Act acts as a direct limitation to the court's jurisdiction in an action such as this one, the government challenge to the timeliness of these libels was properly raised by exceptions and exceptive allegations. *Fleet Corporation* v. *Rosenberg Bros. & Co.*, 276 U. S. 202, 214 (1928); *Levine* v. *United States*, 115 F. Supp. 58 (S. D. N. Y. 1953), aff'd 210 F. 2d 954 (2 Cir. 1954). A reasonable interpretation of section 745 coupled with the facts in these cases indicates that "causes of action" arose far more than two years before the institution of these libels—much closer to a decade prior to suit. Libelants, therefore, are under a duty to "allege sufficient facts to show affirmatively that the suit(s) (were) timely brought, otherwise • • • exception(s) to the libel(s) must be sustained." *Levine* v. *United States, supra* at page 60. Appellants attempt to carry this burden by pointing to Clause 13 of the later charter forms, "Shipsalesdemise 303."

Plaintiffs argue that Maritime contracted, in Clause 13, to refund all "overpayments • • • as may be required" at

the time of final audit. These "overpayments," it is contended, include those connected with the allegedly illegal rate of charter hire. The charterers claim that there was no breach of this contractual duty until Maritime disallowed their claims after final audit—and that a "cause of action" arose then. Appellants' alternate theory is that, regardless of whether it can be said that Clause 13 gives them a "contract" claim arising at the time of final audit, actions for unjust enrichment were timely brought because Clause 13 and later governmental action postponed the date for the running of the statute of limitations until after the final audits.

Clause 13, as quoted above, contains no particulars as to *what kinds* of issues were to be raised at time of final audit; the provision merely speaks broadly of "overpayments." As a matter of pure contract construction, it would be quite difficult to find that a broad, unspecific provision like that found in Clause 13 was a contract to refund, far in the future, payments which should prove illegal (the trial of that issue likewise to be postponed until a dimly future date). That it was an agreement to postpone the running of the time-bar on the illegality claims is an equally strange construction. It is difficult to understand why any government agency would make such an agreement. By the appellants' own contention, the dispute concerning illegality was completely crystallized before they signed the charters; there was no chance of later events varying the statutory authority, or lack of authority, of Maritime to insist on such a provision at the effective dates of the bareboat charters. The practical effect of construing Clause 13 in that manner would be to sanction the "depositing" of huge "overpayments" with the government, which deposits might be accruing an absolutely safe return of interest dependent on the outcome of law suits not even instituted until almost a decade later. Since the

controversy was already ripe at the time of execution of the charters (or at least very nearly so), it is hard to imagine why the parties would then agree to "put it off" ten years. In the absence of more specific language than Clause 13 presents, it cannot be construed to be an agreement to repay, at time of final audit, overpayments based on the illegality of the rates—or as an agreement to delay the running of the time-bar for almost a decade.

Much is made of the difference in language between Clause 13 of "303" and the corresponding language of its prototype clause in the earlier Warshipdemiseout Form 203. The earlier form provided for payments by or to the government, upon final audit, as such audit showed to be due. Clause 13 calls for payments *to* the government as shown to be due by the audit, but provides for "such overpayments (to be) refunded to the Charterer *as may be required.*" The literal language of the later provision would appear to limit payments to the owner after final audit to those shown by the audit to be due—while "overpayments • • • to the Charterer" are not to be so limited. It is argued that this phrasing reflects the intention of the parties to keep the illegality disputes open for the appellants until after final audit. While the wording of the clause might lend itself to such a construction, the result reached is much too heavy a burden to be borne by the rather innocuous phrase "as may be required." The postponement of such a dispute, already formulated and ready for decision at the time of execution of the charters—and possibly involving large sums of money—is an extraordinary provision. If the parties had truly intended such a result, they surely would have provided for it clearly and forcefully; it cannot be said that the language of Clause 13 does that.

Appellants contend that, contract construction aside, they have put forward enough evidence to show that the parties

so intended Clause 13 to operate. This extrinsic evidence is offered to aid in the interpretation of the contract. It was apparently on this basis that the majority of the earlier *in banc* court held that appellants had made a sufficient prima facie showing on the time-bar jurisdiction question to warrant the denial of summary dismissal—and further proceedings in the District Court.

The charterers assert, by affidavit, their protests to the sliding rate of charter hire. They claim that, because of these protests, the paragraph of Clause 13 dealing with preliminary payments was inserted. The internal governmental handling of the monies, in an "Unearned monies" trust account, is hailed as of great significance. Finally, they lean on a smattering of letters between various of the ship operators and the comptroller division of Maritime as proving the intent to postpone *all* disputes, including those involving claims of illegality, until after final audit.

This extrinsic evidence purportedly proving intent is wholly unconvincing. As already stated, the phrasing of Clause 13 itself was a weak and ambiguous (and ineffective) way to reflect a postponement of the allegedly great disputes aroused by the protests of the ship operators. Clause 13, rather clearly however, does postpone the settlement of *some* claims to the time of final audit. In light of this, the trust fund handling of preliminary charter hire payments was wholly consistent with the basic structure of the auditing arrangements provided for in the charters. The inclusion of the illegality claims within the ambit of Clause 13's final paragraph can hardly be inferred from such treatment of the funds. The letters too are weak supporters of appellants' contentions. The exchanges pointed to are all in the period of the mid-1950's—around the time of the respective final audits and the institution of these libels. "Protests" at that time, long after all significant payments of additional charter hire had been paid,

are self-serving and of little probative value. As far as the record advanced by the appellants reflects, there was a deep silence on the illegality question for eight full years. Moreover, the "admissions" claimed to have been made by Maritime are not at all established. Indeed, the letter from Maritime to Blidberg contains, if anything, a refutation of the charterers' contentions. The relevant portion of that letter reads:

> "This office is aware of the questions raised by you with regard to the accountings on which the subject invoices are based; however, the provisions of the charter agreements are binding upon your Company to pay such amounts as were billed to you with the understanding that *refunds will be made of any amounts determined through supplementary accountings, to have been overpaid.*"

Such reference to "supplementary accountings" cannot fairly be interpreted to refer to the illegality claims.

The appellants also advance the contention that their libels should not be dismissed at this stage in the proceedings because it precludes them from use of the otherwise available discovery mechanism. They claim that there is much material in the hands of the government, obtainable through Admiralty Rule 32, which might shed further light on their contention that Maritime "intended" to put off until after final audit the disposition of the disputes over allegedly illegal charter rates and split-1947 accounting. They assert that discovery proceedings in a suit before the Court of Claims has already helped unearth an important "admission" by governmental agents. Although this contention might raise serious questions concerning an apparent clash between the summary disposition usually accorded in cases where the United States pleads, by ex-

ception, the jurisdictional time-bar, *Fleet Corporation* v. *Rosenberg Bros., supra, Levine* v. *United States, supra,* and the benevolent procedural ends usually served by modern federal discovery processes, 4 Moore ¶¶26.02, 26.03, we need not reach this issue.

It is, in our view, immaterial whether the parties "intended" to put off for a decade suit on the illegality claims. Congress waived governmental immunity from suit in this area in the Suits in Admiralty Act, but only for a two year period. Institution of an action within the statutory period is a condition precedent to the court's jurisdiction. *Osbourne* v. *United States, supra, Desmond* v. *United States, supra.* The executive arms of the government, through which the United States does business, have no more power to extend by contract the limited right granted by Congress than they had to create the original right of suit against the sovereign. This fact cannot be affected by the argument that the two year period is left intact—that merely the running of that limitations period is postponed for almost ten years; the results are identical in substance.

This does not mean that governmental contracting agencies are completely precluded from agreeing to "final audit" clauses like Clause 13 of these bareboat charters. But the type of controversies "put off" must involve possible future disputes—those which, because of the accounting give-and-take accompanying this kind of charter arrangement, would present a measure of doubt concerning the exact time when a "cause of action" arose. That sort of arrangement would not do violence to the Congressionally imposed built-in limitation; the deliberate postponing for ten years the trial of a clear and presently existing controversy most certainly *would* subvert the legislative scheme of a limited waiver of immunity. This is equally true whether the extension of

time is interpreted so as openly to postpone the running of the limitations period—or whether the executive agency "contracts" to refund overpayments at a time in the distant future, dependent upon the outcome of law suits brought at that later date on a claimed breach of the agreement to refund.

The applicability of the time-bar is different as regards the second broad class of controversies, those concerning disputed interpretation of the terms of the charters themselves. It would be impossible to say that a cause of action existed concerning these claims at any time during the active lives of these charters. Indeed, Maritime did not even publish its Accounting Regulations for these charters until early in 1950—at which time not only virtually all of the vessels covered by the charters had been returned to the government, but also the greatest percentage of the preliminary payments had been made. There is at least some doubt as to the finality of those Accounting Regulations and it appears there was a good bit of contention back and forth concerning disputed items. Furthermore, a fair reading of Clause 13 would indicate that the settlement of some disputes was meant to be postponed until after preliminary statement or final audit, at which time the respective positions of the contending parties would be clear. It must have been these "contract claims" referred to.

Clause 13 was an effort to postpone final determination of accounting or auditing disputes, that is, the proper interpretation of the contract terms as to whose legality there was no dispute. It appears to be an effective means to that end, for under its machinery there is no actual controversy until the charterer's credits are disallowed on the final accounting, or refund is refused when demanded on preliminary statement. Rulings and preliminary payments are tentative up to that point.

The lack of power in Maritime to "extend" the Congressional limitations period does not apply with such force on these disputes over contract interpretation. Due to the intricate nature of steamship charter accounting problems, final settlement of the bareboat charter accounts had to be postponed far into the future. Final figures on such items as capital employed, expenses—and, therefore, profits —could not be ascertained until ultimate settlement or disposition, long after redelivery of the vessels, of outstanding foreign agency accounts, personal injury claims and the like. Within this framework of a necessarily suspended final accounting, it was permissible for Maritime to agree to put off for later determination the validity of the opposing views on the correct interpretations of the charters at least until either the charterer in preliminary statement, or owner in final audit set forth its claims. By February 21, 1950 Maritime described the procedures to be followed in computation and payment by the charterers. 46 C. F. R. §299.39 ff. Apparently, accountings and supplementary accountings were constantly being submitted to Maritime for approval. It may be that unlike the "illegality" disputes, Maritime never made a firm and final stand on these questions until the issuance of the final audits. However, the right to recover overpayments came into existence at least at the time of the charterer's preliminary statements. Clause 13 and the Regulations plainly contemplated the preliminary statement of charterers' claims by annual and final accountings. The claims involving contract interpretation are time-barred two years after the filing of each preliminary statement. If such statements were not filed upon annual or final accounting under the regulations, the controversy might be postponed to each final audit. It does not appear that, at least after February 1950, any of the charterers omitted to make the preliminary statements contemplated, although such a possibility may exist.

The charterers argue that, even though the "illegality" claims be subject to the time-bar, they still have a right to maintain actions for refund of allegedly illegal exactions paid on additional charter hire within two years of the filing of the libels. The District Courts held, on the authority of *Sword Line*, that such payments were "voluntary" and therefore unrecoverable. Appellants first contend that they were denied a hearing on the question of "voluntary payments." The government nowhere pleaded the voluntary payment issue in its exceptions and exceptive allegations and appellants first realized the issue was in these cases (at the preliminary stage) when their libels were dismissed. They insist they are entitled to a hearing and a chance to introduce evidence refuting the "voluntariness" of the payments.

Appellants' protest does seem at first glance to have substance, for if there is a genuine issue as to voluntariness they are entitled to be heard on it. In all their presentation, however, they point to nothing which would weaken the basis for the ruling of voluntary payments of the amounts now claimed to have been illegally exacted. After the return of the vessels there was no duress. Since the libelants then knew that from their own standpoint they were illegally exacted, the payments must be classed as "voluntary" payments not recoverable in an action against the United States. *United States* v. *Edmondston*, 181 U. S. 500 (1901), *Union Pacific RR Co.* v. *Dodge County Commrs.*, 98 U. S. 541, 543-4 (1878), *Silliman* v. *United States*, 101 U. S. 465, 470 (1879), *Cunard SS Co.* v. *Elting*, 97 F. 2d 373, 377 (2 Cir. 1938).

The record in the instant cases falls far short of a showing that the payments of additional charter hire up to 90% of profits were made under protest. In all of the tax cases relied on, there was a clear protest made accompanied

by a specific reservation of rights. In the cases at bar, appellants point mainly to Clause 13 and their "general" protest before signing the charters in 1946. Since Clause 13 does not effectively reserve the illegality question for final audit, it cannot serve as a "reservation of rights" so as to make the post-redelivery payments "nonvoluntary"; and surely the protest in 1946, overridden when the charterers accepted the charters containing Maritime's sliding charter hire scale, does not serve as a protest for each subsequent overpayment. The letters between the charterers and Maritime in the middle 1950's are also unconvincing. (During the eight year silence, apparently, all significant payments were made—before appellants ever "protested" again.) The exchange of letters between Blidberg and Maritime containing the protest by the former and the urging to pay by the latter followed by more than a year Blidberg's last payment on additional charter hire.[10] The protest by Norgulf was in its letter to Maritime of July 1, 1954. Its last payment on additional charter hire was made in August of the preceding year. It is perhaps particularly significant that to Maritime's request, in January of 1955, that Norgulf pay a sum of $125,778.84 to the government and then later sue for its recovery, Norgulf has turned a deaf ear. It would appear that all of the shippers' protests (which, on the record, are exceedingly sparse considering the host of libelants now before the court) were after the fact, belated attempts to reraise their old protests of illegality. Similarly, any assurances made by agents of

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10 Blidberg's protest letter is dated April 28, 1954; Maritime's letter urging payment December 30, 1954. Subsequently, between January 10 and August 19, 1955, Maritime set off against Blidberg's account $17,725.00 for additional charter hire. This sum was later returned. Blidberg's last previous payment on additional charter hire was on March 30, 1953.

Maritime seem irrelevant in view of the fact that no reliance seems to have been placed on them.

We do not consider these as mutual accounts, open until the last item on either side of the ledger is entered. They are essentially one way, the hire of ships by the charterers and payment of the terms of hire. There is no corresponding hire or sale or furnishing of services by the charterer to the owner. Adjustment of such a transaction by credit for stores and fuel appurtenant to the vessel at the time and place of its return to the owner on termination of the charter does not change the essentially one-directional nature of the transaction.

To recapitulate:

1. The claims to recover allegedly illegal payments, based on the sliding scale profit-sharing and on the split-year accounting in 1947 by reason of the foreign trade addendum are outlawed by the statute of limitations on payments made more than two years before suit, and barred from recovery as voluntary payments if made thereafter.

2. All claims not based on additional charter hire founded on payments made more than two years before suit are outlawed by the statute of limitations.

3. Claims for adjustment of additional charter hire, based on contract interpretation rather than on claims of illegality, are not outlawed if suit was brought within two years of preliminary statement or final audit, whichever was earlier.

The court adopts the disposition of the Blidberg claim for "latent defects" made by Judge Hincks on the previous rehearing *in banc*, 265 F. 2d at 148.

The appeal of Dichmann, Wright & Pugh, Inc. is dismissed.

The judgment in #24190, *American Foreign Steamship Corp.* v. *United States of America* is affirmed.

The judgment in #24400, *Blidberg Rothchild Co., Inc.* v. *United States of America* is affirmed.

The judgment in #24284, *Polarus Steamship Co., Inc.* v. *United States of America* is affirmed.

The judgments in #24401 and #24402, *Fall River Navigation Co.* v. *United States of America* are affirmed.

The judgments in #24200, *Stockard Steamship Corp.* v. *United States of America*, #24285, *A. L. Burbank & Co. Ltd.* v. *United States of America*, #24286, *T. J. Stevenson & Co., Inc.* v. *United States of America*, #24287 and #24289, *North Atlantic and Gulf Steamship Co.* v. *United States of America*, #24291, *A. H. Bull Steamship Co., Bull-Insular Line, Inc. and Baltimore Insular Line, Inc.* v. *United States of America*, #24292, *New York and Cuba Mail Steamship Co.* v. *United States of America*, and #24288, *Luckenbach Steamship Co. Inc.* v. *United States of America*, are reversed and remanded for further proceedings in accordance with this opinion to determine whether or not and to what amount valid claims exist on behalf of the libelants against the United States under the charters in suit.

CLARK, *Circuit Judge*, with whom WATERMAN, *Circuit Judge*, joins, concurring in part and dissenting in part:

The libelants here necessarily assume the task of showing that the parties to these uniform ship charters fully intended by their agreements to change the normal time when a claim for overpayment accrues—i.e., at the time of overpayment—to a later date in the remote and indefinite future. In his opinion Judge Smith gives a masterly demonstration of what wholly unusual contracts these would be

for any government official to make under the circumstances, and of how inadequate the language of the famous Clause 13 is to warn the contractors of what they were (on this interpretation) so strangely doing. The disputes had already arisen before the contracts were made, and they called for large charter hire payments to be made to the government almost immediately. That settlement of these already ripe disputes was to be postponed until all the claims the parties might eventually think of were not only presented, but finally adjusted, would have the government holding the bag at high interest rates for many years or until the claimants were completely satisfied. Actually nearly a decade was consumed before action was instituted, and the matter is not yet settled after another third of a decade of litigation. Such a prolonging of the adjustment of government claims, in an area where the statutes show time to be of the essence, would need to be clearly suggested by contract language and background before it could be accepted. But that quite clearly is not the case here; neither the language nor the inconclusive background brings this out; nor, notwithstanding the suggestion of remand and further hearing first conceived by the former panel, are we given any intimation of any other material which may change the obvious conclusion. For the very inconclusive nature of all this supports Judge Smith's demonstration that the unusual interpretation urged by libelants cannot be considered a reasonable one.

But even though Judge Smith's conclusion is negatively complete, we find difficulty in his affirmative holding finding a distinction between claims for overpayment of additional charter hire based on alleged illegality and those based on interpretation of the contracts with respect to allowances to be made for such matters as capital employed, overhead expenses, agency fees, and so on. This distinction is not illogical if the parties had chosen to make

it. We discover no basis for it, however, in what they did or said. And acceptance of it weakens the grounds for what we believe to be the more reasonable over-all construction of Clause 13, viewed not in isolation as our brothers tend to do, but as a natural, though not overriding, part of this many paragraphed document. Thus viewed we find the reference to "the completion of *each* final audit by the Owner" (italics added) to concern the additional profits made in each "calendar year" and to be accounted for yearly, as the first part of Clause 13 makes clear. (This part is not quoted in the opinion herewith, but does appear at 2 Cir., 265 F. 2d 145, note 3, as well as the dissent herewith.) Hence the proviso of Clause 13 here in issue is a natural corollary of the charge thus levied for additional charter hire on the net profits shown at the end of each calendar year; additionally it avoids the obvious difficulties found in the other interpretations advanced. So after further careful study we reaffirm the interpretation we previously made, as set forth in our opinion at 2 Cir., 265 F. 2d 150-152, from which we now quote salient portions:

> "Turning now to Clause 13 itself—quoted in full in the opinion—it should be noticed that it is not a provision for claim adjustment; nor does it in any way suggest that it was meant to deal with the processing of claims for refund. Clearly it is what it is labeled as being, namely, a provision for 'Additional Charter Hire.' It follows naturally after Clause 12, covering 'Basic Charter Hire,' and in its main section provides a scale for such additional hire based on cumulative net voyage profits of the charter in any *calendar year*. The emphasis on yearly accountings is obvious. The particular provisions here in issue come at the end and deal with preliminary and final payments of such additional charter hire, based on the scale stated. So a method is provided whereby the government can ask

and receive preliminary payments as the money is earned, and the 'final audits' clearly refer to the yearly settlements thus made necessary. Quite simply they are necessary because the progressive rate of additional hire depends on the amount of cumulative profits *for the year.* They just do not fit the concept of an ultimate and probably long delayed settlement of all disputes which might conceivably arise under any of the manifold provisions of these extensive charters. Significantly a much later charter provision does look to such possibility, thereby affording a persuasive contrast. For Clause 28 deals with 'Accounting, Report and Supervision' and requires the keeping of books, the filing of financial statements, and the like, covering all transactions, while it also authorizes the auditing of all books and the maintenance of checks and controls of expenditures and revenues in connection with the operation of any of the chartered vessels. [But it contains no provision postponing the accrual of claims.]

"In the final paragraph of Clause 13 the preliminary statements therein referred to are correlated with the final audit. This places a well-nigh insuperable obstacle in the way of the interpretation claimed by libelants. For the 'adjustment' visualized is to be had 'either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner'; the idea is carried further thus, 'at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.' Each final audit therefore serves a function of settling the payments due on each calendar year's profits. Thus it fits properly with the rest of the clause. It cannot be made to mean some final settlement of all and sundry differences a decade or more hence when

at length both parties are prepared to have a balance struck. Thus the government's brief is correct in saying: 'Thus the charterers' right to file a claim for adjustment and refund of an overpayment of additional hire *and to bring immediate suit if refund was not made* is precisely the same at the time of a charterer's rendition of its preliminary accountings and at the time of the owner's final audit.'

"This natural construction is supported by various Maritime Administration regulations which (1) require the charterer at the end of each calendar month to pay 90 per cent of the additional charter hire then indicated to be due, 46 CFR 299.31(k)(1); (2) provide that such payments are preliminary and subject to adjustment upon completion of audit by the government covering the period involved (the calendar year), id.; (3) provide that tender of the monthly payments and their acceptance do not prejudice rights under the charter or otherwise, id.; (4) require remittance of monthly payments to be accompanied by a preliminary statement, 46 CFR 299.31(k)(2); (5) provide that if this statement indicates that 90 per cent of the cumulative total for the expired portions of the periods involved (calendar year) is less than the total of payments theretofore made for the period, the charterer may apply for a refund, 46 CFR 299.31(k)(5); and (6) require each charterer to submit a separate final accounting of additional charter hire for each annual or over-all accounting period [which under 46 CFR 299.37-1(h) and (i) is defined as a calendar year or a period less than a calendar year, 46 CFR 299.37-2(b)]. Hence, simply put, Clause 13, read with the regulations, provides that the charterers must make monthly payments on account of the additional charter hire which are preliminary because only upon the rendition of preliminary

statements or upon final audit for the year will the parties know whether or not the amounts of the monthly payments were correct.

"Neither in wording nor in practical operability, however, is the Clause appropriate for the adjustment of the type of 'overpayment' here involved. For the charterers knew that as they read the law the sums here claimed were not correct even when remitted. So there is no suggestion anywhere in the contract that the earlier language in Clause 13 bears on these 'overpayments' in any way. Nor is there any suggestion in Clause 13 or in the regulations that the preliminary payments are tentative because the charterers believed the Clause to be illegal or that the parties agreed to put off a judicial determination of the legality of the rates. It is a strange contract which would preclude suit by the charterers to reform the contract or to recover the specific monthly 'overpayments' if actually illegal. But, as the opinion herewith makes clear, libelants to succeed must rely on such an interpretation, viz., that the phrase 'each final audit' can mean only some type of closing-out accounting which ultimately and finally terminates all relations between the charterers and the United States. I submit with all deference that the mere statement of the argument betrays its weakness; without fairly conclusive support somewhere for such a reading there is no 'prima facie showing of jurisdiction.' Surely the parties did not intend an agreement to require the deposits of huge sums of money for an indefinite time pending determination of the legality of the contract rates. For quite clearly the period of limitation can start only when the parties agree and are content that they have eventually obtained an ultimate closing-out accounting. Ironically enough, since even late deposits are to be in-

cluded, there is nothing to prevent the charterers from continuing to make the government a good and safe depositary, paying better than market rates of interest, for their excess funds. Hence for my part I cannot accept this as permissible interpretation against respondent's persuasive showing (wholly consistent with both the charters and the regulations) that 'each final audit' means an audit of the charterers' *yearly* profits."

Therefore we concur in the decision of Judge Smith, except for his direction in the case of eight of the libels that the orders be reversed and the actions be remanded for further hearing; as to these also, we vote to affirm the orders of dismissal. It appears, however, that our brethren are in disagreement as to the extent of the remand thus ordered; upon this limited issue we agree with Judge Smith that the remand should not be more extensive than he directs.

FRIENDLY, *Circuit Judge*, with whom MOORE, *Circuit Judge*, joins, dissenting:

It would have been a happy circumstance if the changes in the membership of the Court since these cases were last before us had led to concord or at least to a closer approach to it. Instead they have resulted in replacing the former 3-2 vote for reversal with a 3-2 vote which, broadly speaking, is for affirmance,—plus a fine opinion by our brother Smith which we applaud for its exposition of the issues, even though we are unable to pay it the ultimate tribute of agreement. Because of his fresh and somewhat different analysis, something more needs be said in the way of an expression of dissent than merely echoing Judge Hincks' opinion for Judges Medina, Moore and himself on the previous *in banc*, 265 F. 2d 136, with which we agree.

Understanding of Clause 13 of Shipsalesdemise 303 necessitates a statement of the controversy whence it stemmed, which, if not different from Judge Smith's in the ultimate, places the emphasis where required. The Act of March 8, 1946, 60 Stat. 41, 50 U. S. C. App. §§1735-1746, had provided both for the sale, §1737, and, in certain cases, §1738, for the charter of war surplus vessels. Section 5(b), 50 U. S. C. App. §1738(b), provided that the charter hire "shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as the date of the charter)." With a certain exception not here material, "rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission." Section 5(c) made applicable "to charters made under this section" various sections of the Merchant Marine Act, 1936; one of these, §709(a), 46 U. S. C. §1199(a), had required "Every charter made by the Commission" to include a clause requiring the charterer to pay over to the Commission as additional charter hire "one-half of such cumulative net voyage profit in excess of 10 per centum per annum" on the charterer's capital employed in operating the chartered vessels. Charters previously made by the War Shipping Administration contained such a 50% clause, 11 F. R. 4669, 4671 (1946).

Announcement by the Commission in August, 1946, that it intended to cancel the War Shipping Administration Warshipdemiseout 203 charters and substitute a new form of charter Shipsalesdemise 303, with a sliding scale reaching as high as 90% of net profits, naturally led to protest from the operators on both business and legal grounds. The

protest clearly was not lacking in legal substance, as shown by the recent decision of the Court of Claims, Madden, *J.*, dissenting, *American Export Lines, Inc.* v. *United States*, —— F. 2d —— (1961), that the new sliding scale went beyond the Commission's legal powers. The meager record available on the exceptions and exceptive allegations to the libels tells us only that "on September 4, 1946, the Maritime Commission rejected the protest of the ship operators • • • but adopted the recommendation of its General Counsel that the clause of the proposed charter party containing the disputed item, i.e., Clause 13, be modified" in a way we shall now describe.

What the operators' protest achieved, as well as what it did not, can best be understood by setting down in parallel columns the relevant provisions of Clause 13 of the previous Form 203 and of Form 303 as issued:

Form 203.	Form 303.
"CLAUSE 13. *Additional Charter Hire.* After redelivery of all Vessels under this Agreement, if the cumulative net voyage profits computed for the period of the agreement (after the payment of the basic charter hire provided herein and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall be in excess of a rate of ten (10) per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels during the period of the agreement (all as herein-	"CLAUSE 13. *Additional charter hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall

after defined in Clause 23) the Charterer shall pay to the owner at Washington, D. C. within sixty (60) days thereafter, an amount equal to one-half of such cumulative net voyage profit in excess of an amount computed for the period of the agreement at the rate of ten (10) per centum per annum on such capital as hire in addition to the hire payable under Clause 12; *Provided, however,* That such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment upon the completion of final audit by the Owner, at which time such payments will be made by or to the Owner as such final audit may show to be due."

pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100. per day, 50%.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100. per day but not in excess of $300. per day, 75% on such excess over $100. per day.

"Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300. per day, 90% on such excess over $300. per day.

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire

> and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiseout) charter (prior to the times of payment provided for above or in such Warshipdemiseout charters) at such times and in such manner and amounts as may be required by the Owner: *Provided*, however, That such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

For the purpose here material Form 303 differed from Form 203 in two important respects. First, it permitted the Commission to call for payments of additional charter hire or the charterers for refunds "at the time of the rendition of preliminary statements," as well as on final audit.[1]

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1 We find it unnecessary to discuss the point, much argued in the opinions when the case was last before us, whether "final audit" means what it says or any annual audit, since Judge Smith very properly assumes the former. Form 303 used the phrase "*each* final audit" because there would be one for the Warshipdemiseout charter and another

Second, instead of providing that "payments will be made by or to the Owner as such final audit may show to be due," it provided that payments will be made to the Owner as the statements or audit show to be due,—note only "to" and not "by"—"or such overpayments refunded to the Charterer *as may be required.*" The latter is the vital phrase. It shows the charterers were not satisfied that the Owner agree to make such payments to them as the statements or audit "may show to be due," as had been provided in form 203; they demanded that the Owner agree to refund "such overpayments • • • to the Charterer as may be required." Why the change? Quite obviously, it would seem, because the charterers insisted that the Owner agree to refund something which the statements and audits would *not* "show to be due"—namely, the overpayments resulting from what the charterers considered an invalid provision in the contract itself. This is the concession which the Charterers got from their protest—and of which the majority would now deprive them.

Perhaps "quite obviously" goes too far, since our brothers do not read the clause as we do. We have used the phrase because that interpretation accords with business sense and with the apparent understanding of the parties (see the Maritime Administration's notice of May 14, 1951, mentioned below and its letters fn. 3), and no one has suggested any other reason for the change. At the very least, however, libelants made a sufficient case that the contract obligated the Owner to refund charter hire illegally collected, "either at the time of the rendition of preliminary statements or upon the completion of each final audit," that they ought be permitted to offer extrinsic

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for the Shipsalesdemise charter. The practice under the charters shows clearly that the parties did not regard annual audits as the "final" audit; these were simply "preliminary statements."

evidence in support of their construction, 3 Corbin, Contracts (1960 ed.), §579, with the important aid of discovery of the Commission's files, rather than be foreclosed by a decision on the pleadings and on affidavits which prick the mind rather than satisfy it—a method for determining such an issue which another Court of Appeals sitting in admiralty has soundly condemned, *Richfield Oil Corp.* v. *United States*, 248 F. 2d 217, 225 (9 Cir. 1957), as have this and other courts in a not unrelated procedural area, see 6 Moore, Federal Practice (1953 ed.), ¶56.15 and ¶56.16.

Indeed, the majority seem to recognize the force of these considerations when they say that exploration of what the parties actually intended would be fruitless since if Clause 13 postpones the accrual of a claim as libelants say, this would go beyond the Commission's contracting powers. Without debating whether the "jurisdictional" character commonly attributed to what would seem an ordinary statute of limitations in the Suits in Admiralty Act, 46 U. S. C. §745, is not an anachronistic carry-over from doctrines of sovereign immunity now generally abandoned, we find neither reason in nor authority for the position that this statute constitutes an implied but universal limitation on the power of government contracting agencies to draw their contracts as they deem best. Section 207 of the Merchant Marine Act, 1936, 46 U. S. C. §1117, which was expressly made applicable to activities under the Act of March 8, 1946, §12 (d), 50 U. S. C. App. §1745 (d), authorized the Commission to "enter into such contracts, upon behalf of the United States, • • • as may, in its discretion, be necessary to carry on the activities authorized by this chapter • • • in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." The Commission may have had excellent reasons for agreeing to purchase peace by a modification of Clause 13 which, by assuring the charterers ample time to

protect their alleged rights, would get the charters signed and keep the ships at sea. Perhaps the Commission was just as well satisfied on its own account to avoid immediate test of its powers. The whole issue might become academic —no one could know in 1946 whether the cumulative net profits would, in fact, exceed 10% on capital. Moreover, the Commission may have had in mind the possibility of obtaining validating or, on its view, clarifying legislation from a future Congress; it might well have thought pending litigation would be an obstacle to this in view of Congressional reluctance to intervene in matters already pending in the courts. In any event, all this was for the Commission to decide; it is of no moment that, in the light of hindsight, we may think its decision to modify Clause 13 to have been unwise. As was said of another officer of government, "we do not find in the statutes defining the powers and duties" of the Commission "any such limitation on the exercise of his discretion as the contention involves. His authority to make determinations includes the power to make erroneous decisions as well as correct ones." *Swift & Co. v. United States*, 276 U. S. 311, 332-333 (1928). We are thus quite unable to join with the majority in attributing to the Suits in Admiralty Act, enacted in 1920, so restrictive a force on the contracting powers of agencies created long afterward and endowed by Congress with the same power of molding their contracts as private corporations enjoy.

If we are right in thinking that Clause 13 gave the charterers a contractual right to recover any overpayment, even for illegality, "at the time of the rendition of preliminary statements or upon the completion of each final audit," or that the charterers are at least entitled to offer parol evidence that it did, we need not tarry over either of the first two dates when our brother Smith thinks the cause of action for the allegedly illegal payments may have

arisen, immediately on signature, since, as he holds, an action for a declaratory judgment, 28 U. S. C. §§2201, 2202, could then have been brought, or upon the first payment exceeding 10%,—although we must express our doubts as to how the date when a "cause of action arises" under the Suits in Admiralty Act of March 9, 1920, 46 U. S. C. §745, can have been accelerated by a new procedural device, enacted fourteen years later, Act of June 14, 1934, c. 512, 48 Stat. 955, whose framers surely had no such thing in mind, and our fears as to the traps for the unwary that would be set if courts were to adopt a general doctrine that causes of action arise as soon as declaratory relief becomes obtainable.[2] An obligee who has been assured that money erroneously exacted from him will be refunded at a later date is not required to sue before then, even though he may. His causes of action for declaratory relief or for money unjustly demanded may be time-barred if he does not sue within the statutory period after these accrue, but his cause of action for breach of contract does not arise until the obligor's performance is due; and he is free to rely on that cause of action and abandon the others.

This brings us to what we regard as the most serious issue in the case—did libelants' contractual claims for refund arise *seriatim* "at the time of the rendition of preliminary statements" or could libelants await final audit? The majority simply assume the former, insofar as they deal with the issue at all.

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2 The opinion cites no authority for this. It seems opposed to the majority rule in at least one analogous situation—namely, that title by prescription does not run against a remainderman until he can bring a possessory action even though a statute permitted him to bring an earlier action to quiet title. *Maxwell* v. *Hamel*, 138 Neb. 49, 292 N. W. 38 (1940); contra, *Murray* v. *Quigley*, 119 Iowa 6, 92 N. W. 869 (1902); see Developments—Declaratory Judgments, 62 Harv. L. Rev. 787, 831, fn. 331 (1949).

We do not deny that libelants could have begun suits for refunds of what they considered additional charter hire illegally exacted, when they rendered preliminary statements. However, it does not necessarily follow they were required so to bring them, under pain of time-bar. The application of the statute of limitations to contracts where a promisee is entitled to periodic performance is a troublesome question, discussed in 6 Williston, Contracts (Rev. ed.), §§2024-2028, and in 3A and 4 Corbin, Contracts (1960 ed.), §§687, 698, 948-51. The cases fall into two lines. One is illustrated by decisions that the statute runs separately against each instalment of a debt, as, for example, against each right to collect interest on bond coupons, *Amy* v. *Dubuque*, 98 U. S. 470 (1879), or against each instalment of salary under a contract of employment, *Gensman* v. *West Coast Power Co.*, 3 Wash. 2d 404, 101 P. 2d 316 (1940). See cases cited in Annot., 82 A. L. R. 316. On the other hand, if the contract calls for the payment of an entire sum for a specified overall performance, with the right to collect advance payments, as in the case of progress payments to a contractor, *City of Albany* v. *Leftwich*, 24 F. 2d 297 (5 Cir. 1928), cert. denied, 277 U. S. 599 (1928); *Rich* v. *Arancio*, 277 Mass. 310, 178 N. E. 743 (1931), or payments to an attorney retained in connection with a single litigation, *Walker* v. *Goodrich*, 16 Ill. 341 (1855), the obligee may safely wait until the entire sum is due and sue for that without fear of the statutory bar on the earlier instalments. A decision somewhat analogous to the instant case is *Board of County Commissioners* v. *Hudson*, 143 Kan. 454, 54 P. 2d 994 (1936). This involved a two year printing contract, with the printer submitting to the county an itemized monthly bill; the court held the county's suit to recover overcharges, brought within the statutory period after the termination of the contract, was timely as to all months

although the period had elapsed as to many individual payments.

The instant case falls within the second line of decisions. The very language of the contract "preliminary and subject to adjustment" seems to negative an intention to require litigation before the final audit. Consistently with this, the Maritime Administration sent all charterers, on May 14, 1951, a notice requesting that checks submitted with preliminary accountings should bear no restrictive legends but rather should be accompanied by a letter of transmittal stating "that the remittance is *on account* of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise." The amount of additional charter hire due for any period could be substantially changed by subsequent accounting adjustments; it might even be eliminated if libelants are right in their belief that subsequent deficiencies in rate of return may be applied to reduce excesses previously reported. If the Owner under these charters were a person not enjoying the Government's immunity from statutes of limitations, could a charterer successfully assert the Owner was barred from recovering amounts due on preliminary statements as to which the period had run, although suit was timely begun after final audit? We think not—and also that the rule works both ways.

Moreover, even if it were to be held that a sounder view of the law of limitations would require claims based on

the illegality of the exactions to be asserted within two years of the respective preliminary statements rather than of final audit, the libels ought not be dismissed as to claims of that nature as to which suit was brought within two years of such statements; since libelants are suing on an express contract which validly postponed accrual of their causes of action at least that long, there is no need to show that such payments were "involuntary."[3] And on no view can we see any legitimate basis for holding that any of the claims which relate only to the amount of additional charter hire, assuming the contracts to be valid, are barred. Judge Smith does not doubt the power of the Maritime Commission to postpone determination of such claims, as he does with respect to the claims of illegality; hence the only question is how long determination was postponed. No one has suggested what purpose would have been served for anyone by a construction that would require a charterer to rush into the courts for the determination of the multitude of such claims, which Judge Smith recognizes to be bound to arise, on the submission of each preliminary statement, under pain of otherwise becoming time-barred. Happily, persons engaged in the performance of complex contracts have learned other ways of working out their differences than constant resort to the courts; they wait until all the disputed items are before them and then generally come to a conclusion no less satisfactory for not being altogether

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3 On our reading of Clause 13 there is no reason to speculate why the companies continued to pay the allegedly illegal charter hire after the ships were returned. However, it ill becomes the Government to urge this in view of its repeated demands that the charterers make the payments and rely on their right to refund on final audit. See letter of December 30, 1954 to Blidberg Rothchild Co.; letter of July 15, 1955 to James Griffiths & Sons, Inc.; letter of March 8, 1955 to North Atlantic and Gulf SS. Co., Inc. Moreover, the threat of "the placing of a government-wide set-off payment order," would seem a sufficient explanation, letter of December 30, 1954 to Blidberg Rothchild Co.

scientific. The law of limitations should encourage this sensible process of adjustment—not require immediate entry into the judicial arena under threat of the expiry of a short statutory bar.

We would therefore reverse the orders dismissing the libels[4] with instructions to permit the parties to offer relevant evidence as to the meaning of Clause 13 and to take further proceedings consistent with this opinion.[5]

---

4 This is subject to an exception for the Blidberg claim for "latent defects" as to which we join with our brothers in adopting Judge Hincks' disposition on the previous rehearing *in banc*, 265 F. 2d at 148.

5 Naturally this means that we join in so much of Judge Smith's opinion as reverses the dismissal of certain claims.

JUDGMENTS OF COURT BELOW

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of May one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

STOCKARD STEAMSHIP CORPORATION,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings to determine whether or not and to what amount valid claims exist on behalf of the libelants against the United States

under the charters in suit in accordance with the opinion of this Court; with costs to the appellant.

A. DANIEL FUSARO,
Clerk

Note: The judgments in North Atlantic and Gulf Steamship Co. (two cases); A. L. Burbank & Company, Ltd.; Luckenbach Steamship Company, Inc.; A. H. Bull Steamship Co., *et al.*; New York and Cuba Mail Steamship Company; and T. J. Stevenson & Co., Inc., are identical with the above Stockard judgment.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of May one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

POLARUS STEAMSHIP CO., INC.,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO,
Clerk

Note: The judgments in Fall River Navigation Company (two cases) and Blidberg Rothchild Co., Inc., are identical with the above Polarus judgment.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of May one thousand nine hundred and sixty-one.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

DICHMANN, WRIGHT & PUGH, INC.,
Libelant-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal from the decree of said District Court be and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk

RELEVANT STATUTORY PROVISIONS

Suits in Admiralty Act
(46 U.S.C. 742 and 745)

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. . . .

* * * * *

SEC. 5. That suits as herein authorized may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this Act it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: . . .

Merchant Ship Sales Act of 1946
(50 U.S.C. App. 1738(a), (b), (c) and 1745(d))

CHARTER OF WAR-BUILT VESSELS TO CITIZENS

SEC. 5. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel, under the jurisdiction and control of the Commission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant

would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3 (c) of this Act.

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

* * * * *

GENERAL PROVISIONS

SEC. 12. . . .

(d) All moneys received by the Commission under this Act shall be deposited in the Treasury to the credit of miscellaneous receipts. The provisions of sections 201(d), 204(b), 207, 209(a), and 905(c) of the Merchant Marine Act, 1936, as amended, shall apply to all activities and functions which the Commission is authorized to perform under this Act.

SEC. 207. The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this Act, or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter.

* * * * *

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

Declaratory Judgment Act
(28 U.S.C. 2201 and 2202)

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * * * *

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

PENDING SUITS AFFECTED BY THIS PETITION FOR CERTIORARI

The twenty-seven similar cases (excluding those of petitioners) pending in various district courts throughout the country are as follows:

SOUTHERN DISTRICT OF NEW YORK:

American Export Lines, Inc. (No. A. 191-109); W. R. Chamberlin & Co. (No. A. 184-18C); Eastport Steamship Corporation (No. A. 190-175); Isbandtsen Company, Inc. (No. A. 184-51); Prudential Steamship Corporation (No. A. 192-293); Wessel, Duval & Co. (No. 60-Ad-67); T. J. Stevenson & Co., Inc. (No. A. 198-41).

EASTERN DISTRICT OF MASSACHUSETTS:

Massachusetts Trustees of Eastern Gas and Fuel Associates (Adm. No. 55-26-W); Sprague Steamship Company (Adm. No. 53-80-F).

DISTRICT OF DELAWARE:

Blidberg Rothchild Co., Inc. (Adm. No. 1758); Marine Transport Lines, Inc., *et al* (Adm. No. 1747); Pacific-Atlantic Steamship Co. (Adm. Nos. 1722 and 1737); Smith-Johnson Steamship Corp. (Adm. No. 1755); South Atlantic Steamship Line, Inc. (Adm. Nos. 1735 and 1757).

DISTRICT OF MARYLAND:

Black Diamond Steamship Corp. (Adm. No. 3885).

Eastern District of Louisiana:

Lykes Bros. Steamship Co., Inc. (Adm. No. 2817); Mississippi Shipping Company, Inc. (Adm. No. 2845).

Northern District of California:

Coastwise Line (Adm. No. 27398); Pacific Far East Line, Inc. (Adm. No. 27170); Pacific Transport Lines, Inc. (Adm. No. 27101); Pope & Talbot, Inc. (Adm. No. 27161).

Western District of Washington:

American Mail Line, Ltd. (Adm. No. 16231); James Griffiths & Sons, Inc. (Adm. No. 16218); Olympic Steamship Co., Inc. (Adm. No. 16233); States Steamship Company (Adm. No. 7702).

ILLUSTRATIVE SCHEDULE OF PRELIMINARY PAYMENTS

ITEMS PAID, DEBITED, OR CREDITED IN ACCOUNTS BETWEEN MARITIME AND T. J. STEVENSON & CO., INC.

Libel filed March 16, 1955,
covering Contract No. MCe-41888.

	To Maritime from Stevenson					To Stevenson from Maritime					
	Additional Charter Hire			Inventory Shortages		Additional Charter Hire	Inventory Overages				
Date	MBA-12986	MCe-41888	MCe-62753	Consumable Stores	Expendable Equipment	MCe-41888	Consumable Stores	Expendable Equipment	Other	Net Debit or (Credit)	Date
12-30-46	187,069.18	-	-	-	-	-	-	-	-	187,069.18	12-30-46
2-28-47	12,528.70	-	-	-	-	-	-	-	-	12,528.70	2-28-47
3-21-47	137,591.54	7,833.77	-	-	-	-	-	-	-	145,425.31	3-21-47
5-20-47	-	870.42	-	-	-	-	-	-	-	870.42	5-20-47
5-21-47	21,848.76	61,532.82	-	-	-	-	-	-	-	83,381.58	5-21-47
6-30-47	93,154.98	-	-	-	-	17,806.18	-	-	-	75,348.80	6-30-47
7-9-47	41,295.61	60,309.48	-	-	-	-	-	-	-	101,605.09	7-9-47
9-3-47	-	10,986.26	-	-	-	-	-	-	-	10,986.26	9-3-47
10-9-47	-	28,748.67	-	-	-	-	-	-	-	28,748.67	10-9-47
11-12-47	-	59,667.47	-	-	-	-	-	-	-	59,667.47	11-12-47
12-9-47	-	222,219.86	-	-	-	-	-	-	-	222,219.86	12-9-47
4-6-48	-	-	-	-	-	-	-	-	(A) 1,150.00	(1,150.00)	4-6-48
5-3-48	18,987.54	18,757.70	-	-	-	-	-	-	-	37,745.24	5-3-48
9-13-48	7,187.94	112,436.93	-	-	-	558.14	-	-	-	119,066.73	9-13-48
3-23-49	-	100,736.48	-	-	-	-	-	-	-	100,736.48	3-23-49
3-31-49	-	10,925.03	-	-	-	-	-	-	-	10,925.03	3-31-49
5-11-49	-	33,636.85	-	-	-	-	-	-	-	33,636.85	5-11-49
5-31-49	-	46.49	-	-	-	-	-	-	-	46.49	5-31-49
8-29-49	-	-	-	-	-	-	-	-	(B) 280.00	(280.00)	8-29-49
12-19-49	-	-	-	-	-	-	-	-	(C) 1,046.53	(1,046.53)	12-19-49
4-28-50	-	-	-	-	-	-	-	-	(D) 628.51	(628.51)	4-28-50
6-27-50	-	-	-	-	-	-	-	-	(E) 420.00	(420.00)	6-27-50
6-29-50	-	-	-	-	-	-	-	-	(F) 1,728.00	(1,728.00)	6-29-50
8-10-50	-	-	-	-	-	-	7,197.94	-	-	(7,197.94)	8-10-50
8-30-50	-	-	-	7,484.27	-	-	9,826.99	-	(G) 331.17	(2,011.55)	8-30-50
7-10-51	-	-	-	-	-	-	-	-	(H) 4,000.00	(4,000.00)	7-10-51
11-20-51	33,031.98	45,751.02	-	-	-	26,176.84	-	-	-	52,606.16	11-20-51
1-25-52	-	-	-	10,621.22	-	-	-	-	-	10,621.22	1-25-52

5-21-47	21,848.76	61,532.82	-	-	-
6-30-47	93,154.98	-	-	-	-
7-9-47	41,295.61	60,309.48	-	-	-
9-3-47	-	10,986.26	-	-	-
10-9-47	-	28,748.67	-	-	-
11-12-47	-	99,667.47	-	-	-
12-9-47	-	222,219.86	-	-	-
4-6-48	-	-	-	-	-
5-3-48	18,987.54	18,757.70	-	-	-
9-13-48	7,187.94	112,436.93	-	-	-
3-23-49	-	100,736.48	-	-	-
3-31-49	-	10,925.03	-	-	-
5-11-49	-	33,636.85	-	-	-
5-31-49	-	46.49	-	-	-
8-29-49	-	-	-	-	-
12-19-49	-	-	-	-	-
4-28-50	-	-	-	-	-
6-27-50	-	-	-	-	-
6-29-50	-	-	-	-	-
8-10-50	-	-	-	-	-
8-30-50	-	-	-	7,484.27	-
7-10-51	-	-	-	-	-
11-20-51	33,031.98	45,751.02	-	-	-
1-25-52	-	-	-	10,621.22	-
5-19-52	-	-	-	-	11,233.23
5-21-52	-	-	-	-	4,779.80
5-31-52	-	-	8,952.76	-	-
7-11-52	-	-	876.38	-	-
11-27-53	919.58	37,364.88	-	-	-
5-20-54	-	-	-	-	-
6-10-54		-	-	-	-

* Items below this line were within two years of the libel.

(A) Repairs

(B) Repairs - Gate Valve.

(C) Deficiencies in Inventories.

(D) Reimbursement for deficiencies on delivery.

(E) Repairs

(F) Repairs - Installing Port Lights.

(G) Disallowances on SS Charles Paddock ($257.66) and Joseph Pulitzer ($73.51)

(H) Rudder Repairs.

(I) Redelivery Diversion Expenses.

(K) Redelivery Diversion Expenses.

-	-	-	-	83,381.58	5-21-47
17,806.18	-	-	-	75,348.80	6-30-47
-	-	-	-	101,605.09	7-9-47
-	-	-	-	10,926.86	9-3-47
-	-	-	-	88,748.67	10-9-47
-	-	-	-	59,667.47	11-12-47
-	-	-	-	222,219.86	12-9-47
-	-	-	(A) 1,150.00	(1,150.00)	4-6-48
-	-	-	-	37,745.24	5-3-48
398.14	-	-	-	119,066.73	9-13-48
-	-	-	-	100,736.48	3-23-49
-	-	-	-	10,925.03	3-31-49
-	-	-	-	33,636.85	5-11-49
-	-	-	-	46.49	5-31-49
-	-	-	(B) 280.00	(280.00)	8-29-49
-	-	-	(C) 1,046.53	(1,046.53)	12-19-49
-	-	-	(D) 628.51	(628.51)	4-28-50
-	-	-	(E) 420.00	(420.00)	6-27-50
-	-	-	(F) 1,728.00	(1,728.00)	6-29-50
-	7,197.94	-	-	(7,197.94)	8-10-50
-	9,826.99	-	(G) 331.17	(2,011.55)	8-30-50
-	-	-	(H) 4,000.00	(4,000.00)	7-10-51
26,176.84	-	-	-	52,606.16	11-20-51
-	-	-	-	10,621.22	1-25-52
-	-	4,833.56	-	6,399.67	5-19-52
-	-	1,581.40	-	3,198.40	5-21-52
-	-	-	-	8,952.76	5-31-52
-	-	-	-	876.38	7-11-52
-	-	-	-	38,284.46	11-27-53
-	-	-	(I) 6,725.02	(6,725.02)	5-20-54
-	-	-	(K) 11,259.45	(11,259.45)	6-10-54

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AUG 23 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 332

STOCKARD STEAMSHIP CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

J. FRANKLIN FORT
529 Tower Building
Washington 5, D. C.
Counsel for Petitioners

KOMINERS & FORT
JOHN CUNNINGHAM
ISRAEL CONVISSER
Of Counsel

August 18, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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EXPLANATORY STATEMENT

Appendix A, bound into the petition for certiorari, contains the opinions of the first *en banc* court, dated July 28, 1958, in favor of petitioners (265 F. 2d 136, at 144; App. A, pp. 1a-26a), and the opinions of the second *en banc* court, dated May 26, 1961, adverse to petitioners (App. A, pp. 27a-68a).

This supplemental appendix contains the opinions of District Judge Palmieri in *A. H. Bull Steamship Co., et al.* v. *United States*, 141 F. Supp. 58 (S.D.N.Y. 1956), *infra*, pp. 81a-86a; and of District Judge Herlands (unreported), *infra*, p. 93a-ftn. It also contains the opinion of the three-judge panel of the Court of Appeals, *sub nom. American-Foreign Steamship Corporation, et al.* v. *United States*, 265 F. 2d 136 (2 Cir. 1957), *infra*, pp. 87a-99a; and the opinions of the first *en banc* court, denying the Government's petition for rehearing, 265 F. 2d 136, at 156 (2 Cir. 1959), *infra*, pp. 100a-104a.

The pagination herein is a continuation of that in Appendix A to the petition, which ends at p. 79a.

OPINION OF JUDGE PALMIERI DENYING MOTION TO AMEND LIBEL AND SUSTAINING EXCEPTIVE ALLEGATIONS (A. H. Bull Steamship Co., et al. v. United States, 141 F. Supp. 58 (S.D.N.Y. 1956))

UNITED STATES DISTRICT COURT

Southern District of New York

A. H. Bull Steamship Co., Bull-Insular Line, Inc., Baltimore-Insular Line, Inc., Libelants, *against* United States of America, Respondent.	A. 181-349
Dichmann, Wright & Pugh, Inc., Libelant, *against* United States of America, Respondent.	A. 182-397
A. L. Burbank & Company, Ltd., Libelant, *against* United States of America, Respondent.	A. 182-103
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AMERICAN-FOREIGN STEAMSHIP CORPORATION, Libelant, *against* UNITED STATES OF AMERICA, Respondent.	A. 183-356

MEMORANDUM.

PALMIERI, D. J.

These libels present substantially similar questions. They have been brought to recover alleged overpayment of charter hire made to the Maritime Commission. The termination of the charters and the redelivery of the vessels in question by the libelants to the Maritime Commission took place in all cases more than two years before the suits were brought. The United States has filed exceptions to the libels as well as exceptive allegations on the ground that the suits are barred by lapse of time since they were not commenced within two years after the causes of action arose pursuant to Section 5 of the Suits in Admiralty Act, 46 U. S. C. 745.

The issues presented here are substantially the same as those which were decided adversely to the libelants by the Court of Appeals for this circuit in two recent cases. *Sword Line, Inc.* v. *United States,* Ct. of App., 2d Cir., Docket No. 23723, February 24, 1956, *also,* 230 F. 2d 75 (2d Cir. 1956), 228 F. 2d 344 (2d Cir. 1955); *American Eastern Corp.* v. *United States,* Ct. of App., 2d Cir., Docket No. 23921, April 19, 1956, *affirming,* 133 F. Supp. 11 (S. D. N. Y. 1955). The impact of these decisions is that the causes of action, if any, accruing to the libelants with respect to any payments made to the Maritime Commission arose upon redelivery of the vessels. The position consistently taken by the Government in these cases and justified by the authorities, has been that any payments made after redelivery of the vessels (the charter being thereby terminated) must be deemed to have been made voluntarily regardless of any accompanying protests. See *Union Pacific R. R.* v. *Board of County Comm'rs,* 98 U. S. 541 (1879); *Cunard Steamship Co.* v. *Elting,* 97 F. 2d 373 (2d Cir. 1938). Therefore, even though the dates of the libel-

ants' alleged overpayments are not stated in their libels, it is clear that those for which recovery can be maintained must have antedated the redelivery dates, as subsequent payments are not recoverable. And since all of the redelivery dates here were more than two years prior to the suits in question, any suits for payments made prior to these redelivery dates are barred by the statute indicated.[1]

After the argument of the respondent's motions in support of the exceptions, the libelants in all the cases except *American-Foreign Steamship Corporation* v. *United States* moved for leave to amend the libels in substantially three respects so as to allege: First, that pursuant to an agreement with the respondent all payments were tentative and subject to a final adjustment by audit; second, that the funds paid were "trust funds" held by the respondent as such for subsequent refund pursuant to an eventual audit by the Maritime Commission; and third, that within two years last past refunds by respondent became due and payable to the libelants. Clearly, the last proposed amendment is nothing more than a legal conclusion and need not be considered. In point of fact, however, this amendment as well as the other two proposed amendments were in effect, urged in the *American Eastern Corp* v. *United States* case, *supra,* and were there rejected and held to have failed to impart any validity to the libels. It happens that the counsel for all the libelants here, except *American-Foreign Steamship Corporation,* were also counsel for *American Eastern Corp.* in the District Court and in the Court of Appeals. I have compared the amendments urged there and here and they are substantially the same. The only material difference between the proposed amendments which libelants seek to incorporate in the respective libels now before this Court,

[1] The actual redelivery dates are set forth in the libels in the *American-Foreign Steamship Corporation* and *Luckenbach Steamship Company* cases; in the remaining cases they are set forth in the Government's exceptive allegations. Their accuracy has not been disputed.

and the proposed amended libel in *American Eastern Corp.* v. *United States, supra,* is that the libelants now propose the following additional allegations:

> "• • • The preliminary payments of charter hire made by libelant were deposited as 'unearned moneys' in a trust account and there retained to be refunded after completion of audit. Within two years last past, refunds by respondent became due and payable to libelant pursuant to such agreement."

But the "trust account" argument was urged by counsel for the libelants when they represented *American Eastern Corp.* before the Court of Appeals and it was clearly rejected by the Court. This point was urged after the argument before the Court of Appeals by letter addressed to the Clerk of that Court and which the Clerk was requested to bring to the attention of the Court. A reply to this letter was submitted to the Court thereafter by the United States on April 10, 1956.

Counsel for the libelants suggested upon the argument that perhaps this point has not been treated with the same degree of thoroughness as might have been the case if the point had been raised in the briefs and argued when the appeal was submitted. I cannot agree. Moreover, I consider the decision of the Court of Appeals in this matter to be binding authority upon me.

Counsel for the libelants suggested upon the argument that perhaps a decision on these motions might be held in abeyance pending possible decisions by the Supreme Court in the *American Eastern* and *Sword Line,* cases, *supra,* or in *Smith-Johnson Steamship Corp.* v. *United States,* decided by the U. S. Court of Claims March 6, 1956, involving substantially the same issues. In view of the clear and unequivocal position taken by the Court of Appeals in this matter, I can see no valid basis for postponing my decision.

Accordingly, the motions for leave to amend the libels are denied. The exceptive allegations, and the exceptions in the *American-Foreign Steamship Corporation* and *Luckenbach Steamship Company* cases, are sustained. The cross-motion by American Foreign Steamship Corporation to dismiss its own amended libel for lack of jurisdiction of the district court over the subject matter is denied on the authority of the *American Eastern* and *Sword Line* cases, *supra*.

Settle orders on notice.

Dated: May 11, 1956.

EDMUND L. PALMIERI
U. S. D. J.

OPINION OF THREE-JUDGE PANEL OF COURT OF APPEALS (American-Foreign Steamship Corporation, et al. v. United States, 265 F. 2d 136 (2 Cir. 1957)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 126, 135, 214-225—October Term, 1956.

(Argued January 15, 1957 Decided September 25, 1957.)

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

No. 24190

AMERICAN-FOREIGN STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24200

STOCKARD STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24291

A. H. BULL STEAMSHIP CO., BULL-INSULAR LINE, INC., BALTIMORE INSULAR LINE, INC.,

Libelants-Appellants,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24292

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24283

DICHMANN, WRIGHT & PUGH, INC.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24284

POLARUS STEAMSHIP CO., INC.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24285

A. L. BURBANK & COMPANY, LTD.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24286

T. J. STEVENSON & CO., INC.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Nos. 24287 and 24289

NORTH ATLANTIC AND GULF STEAMSHIP CO.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24288

LUCKENBACH STEAMSHIP COMPANY, INC.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 24400

BLIDBERG ROTHCHILD CO., INC.,

Libelant-Appellant.

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Nos. 24401 and 24402

FALL RIVER NAVIGATION CO.,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

MEDINA and HINCKS, *Circuit Judges*, and
LEIBELL, *District Judge*.

Consolidated appeals from orders of the United States District Court for the Southern District of New York, Palmieri and Herlands, *JJ.*, finally dismissing for lack of jurisdiction libels to recover allegedly illegal overcharges made by the Maritime Commission on its charter dealings with the libelants. Affirmed as to all appeals except the Diehmann, Wright & Pugh, Inc. appeal, which is dismissed.

J. FRANKLIN FORT, KOMINERS & FORT, Washington, D. C. (John Cunningham, Israel Convisser and Edwin K. Reid, of counsel), *for all libelants-appellants except American-Foreign Steamship Corp.*

Of Counsel:

Burlingham, Hupper & Kennedy, New York, N. Y., for North Atlantic & Gulf Steamship Co. and Luckenbach Steamship Co.

Cravath, Swaine & Moore, New York, N. Y., for New York and Cuba Mail Steamship Company.

Hill, Betts & Nash, New York, N. Y., for Dichmann, Wright & Pugh, Inc.

Kirlin, Campbell & Keating, New York, N. Y., for A. H. Bull Steamship Co., etc.

Lester Levin, New York, N. Y., for Polarus Steamship Co., Inc., A. L. Burbank & Co., Ltd., and T. J. Stevenson & Co., Inc.

Zock, Petrie, Sheneman & Reid, New York, N. Y., for Stockard Steamship Corp., Blidberg Rothchild Co., Inc., and Fall River Navigation Company (Roberts & McInnis, Washington, D. C., Francis J. O'Brien, Charles B. McInnis, and Roger H. Muzzall, of counsel, in Fall River Navigation Company).

ARTHUR M. BECKER, FOLEY, JAMES & CONRAN, New York, N. Y. (Becker & Maguire, Washington, D. C., of counsel), *for libelant-appellant American-Foreign Steamship Corporation.*

BENJAMIN H. BERMAN, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice (George Cochran Doub, Asst. Attorney General, Paul W. Williams, United States Attorney, S. D. N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., on the brief), *for United States of America.*

HINCKS, *Circuit Judge*:

Each of the libelants herein chartered ships from the Government pursuant to the Merchant Ship Sales Act, 50 U. S. C. A. App. §1735 *et seq.*, and agreed to various terms of a standard charter, which made the rental price depend in part on the amount of the profit realized by the charterer. The libelants claim that the Maritime Commission, contrary to provisions of the Act, exacted from them too great a percentage of the profits and these actions were brought under the Suits in Admiralty Act, 46 U. S. C. A. §741 *et seq.*, to recover the illegally collected amounts. The foregoing cause of action is asserted in each of the libels. In several of the cases some payments were made by the shippers after redelivery of the ships and within two years of the filing of the libel. And some of the libelants sought to obtain refund of certain alleged overcharges caused by the Commission's refusal to allow certain expense deductions and its refusal to permit cumulative accounting under certain circumstances.[1]

In each case, the Government moved to dismiss the libels because of lack of jurisdiction, on the ground that all of the claims stated therein were barred by the two-year limitation of the Suits in Admiralty Act, 46 U. S. C. A. §745. As to this, the Government's position was that the causes of action accrued as of the time the libelants returned their ships to the Commission, and that this "redelivery" date in all cases was more than two years prior to the commencement of suit. We append to this opinion a chart showing the dates pleaded in the libels and, in some cases,

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1 A few of the libels alleged disputes as to the valuation of specific items entering into the cost basis upon which the profits were calculated. These included differences concerning the amount of "capital necessarily employed," the "post redelivery overhead expenses," the "cost of repairing latent defects," "management fees" and "agency fees."

in the Government's exceptive allegations. Since the dates in the exceptive allegations were not challenged, we accept them as true.

Judge Palmieri, in an opinion reported at 141 F. Supp. 58, dismissed all the libels, except those of Blidberg Rothchild and Fall River Navigation Co., and denied leave to amend because, however pleaded, the actions were time-barred. Judge Herlands, in a memorandum opinion set out in the margin,[2] dismissed the Blidberg Rothchild and Fall River Navigation Co. libels for the same reason. The sole question presented on this appeal is whether it was correct to dismiss the libels and deny amendment because jurisdiction was lacking.

2

"November 5, 1956

MEMORANDUM

"Libelant here seeks to recover from respondent alleged overpayments made pursuant to its charter of certain Government-owned vessels. Libelant further seeks leave to amend its libel in order to allege, in fuller detail, the transactions giving rise to the alleged causes of action.

"Respondent excepts to the libel as time-barred under Suits in Admiralty Act, 46 U. S. C. A. section 741, et seq., and opposes the proposed amended libel on the theory that, as amended, the libel still fails to state a cause of action accruing within the required two-year limit prior to the date of filing of the libel.

"Respondent's exception is sustained; libel dismissed. Libelant's application for leave to amend is denied.

"The points now at issue before the Court have been too well-settled by recent authoritative decisions as to require consideration de novo. *Sword Line* v. *United States*, 228 F. 2d 344 (C. A. 2 1955), aff'd on petition for rehearing 230 F. 2d 75 (1956), aff'd 351 U. S. 976 (1956), cert. having been granted only on the question of admiralty jurisdiction; *American Eastern Corp.* v. *United States*, 133 F. Supp. 11 (S. D. N. Y. 1955); aff'd 231 F. 2d 664 (C. A. 2 1956), cert. denied 351 U. S. 983 (1956); *A. H. Bull Steamship Co.* v. *United States*, 141 F. Supp. 58 (S. D. N. Y. 1956). The Court has read the briefs in the three cited cases and is satisfied that the questions of law presented herein were adequately argued before and decided by the courts in such cases.

"Settle order on notice.

WILLIAM B. HERLANDS
United States District Judge."

Before dealing with this question, we note that we are without appellate jurisdiction over the Dichmann, Wright & Pugh appeal. Dichmann, in its reply brief, conceded that, since the second count of its libel was still pending in the District Court, its appeal from the dismissal of the first and third counts was interlocutory. It cited 28 U. S. C. A. §1292(3) as express statutory authority for us to entertain this appeal. But our authority to entertain interlocutory admiralty appeals is limited by the requirement of 28 U. S. C. A. §2107 that the appeal be filed within 15 days after entry of judgment. Here, the judgment appealed from was filed on May 22, 1956 and the appeal was not filed until August 10, 1956,—more than 15 days later. The appeal therefore is too late, and must be dismissed. *The Fanny D* (*Eggers* v. *Southern Steamship Co.*), 5 Cir., 112 F. 2d 347, cert. den. 311 U. S. 680; *Blaske* v. *Dick*, 7 Cir., 126 F. 2d 96, 98.

In the appeals which are properly before us, the following facts are pertinent to the issues raised. The Maritime Commission in 1946 was authorized by statute to charter vessels owned by the Government. The statute, 50 U. S. C. A. App. §1735 *et seq.*, provided for rental rates in §1738, which incorporated by reference §709(a) of the Merchant Marine Act, 46 U. S. C. A. §1199(a). This latter section provided that every charter executed by the Maritime Commission should contain provision that, whenever the charterer's adjusted profits exceed a certain amount, the charterer must pay as additional charter hire one-half of the profits in excess of a 10% return of employed capital. The Commission, claiming that §709(a) merely set a minimum additional charter hire, proceeded to charter its ships pursuant to charters which provided a sliding scale for the additional charter hire depending on the amount of profit per day in excess of the 10% return. The libelants, as charterers, agreed to progressive rates which allowed the Commission

to recapture 90% of the profits in excess of $300 per day, per vessel, above the 10% return, and made payments accordingly.

However, the libelants objected to the sliding scale rate as illegal before making payment thereunder and obtained from the Maritime Commission the assurance that payments of charter hire were to be deemed preliminary and subject to adjustment until final audit. In recognition of this the Commission inserted Clause 13 in the charters.[3] In addition, the libelants claim that all parties to the charters operated under the assumption that, until final audit, charter hire payments were merely preliminary. To support this, they point to Commission regulations, 46 CFR §§299.31 (k) (1), 299.37-2 (a) (1), (2) and (b) (3), to instructions such as the one set out in the margin,[4] and to the Commis-

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3 "Clause 13. Additional Charter Hire. • • •

• • • • • •

"The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warshipdemiseout) charter (prior to the times of payment provided for above or in such Warshipdemiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required."

4 "Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either

sion's routine procedure, established pursuant to instructions from the General Accounting Office, of depositing the additional charter hire in an "unearned money" account rather than in the "miscellaneous receipts" account required by statute, 50 U. S. C. A. App. §1745(d).

The libelants argue that the cause of action for return of charter hire illegally exacted accrued as of the date of final audit, or—at the earliest—when the last payment or credit entry in their account with the Commission was made. In all cases this would avoid the time bar. The Government contends that the statute commenced running as of the date when each libelant redelivered the chartered vessels to the Commission. If this be so, these libels would be time-barred.

We agree with the judges below that the basic issues in this appeal were decided adversely to the appellants in our decision in *Sword Line* v. *United States,* 2 Cir., 228 F. 2d 344, aff'd on petition for rehearing 230 F. 2d 75, aff'd as to jurisdiction 351 U. S. 976, and in *American Eastern Corp.* v. *United States,* 133 F. Supp. 11, aff'd 2 Cir., 231 F. 2d 664, cert. den. 351 U. S. 983.

The *Sword Line* case held that a cause of action, such as that presented in these appeals, accrues as of the redelivery date. See 228 F. 2d 344, 347; 230 F. 2d 75, 76. In so holding, the majority in that case carefully considered and explicitly rejected the argument that the effect of Charter Clause 13 was to delay the commencement of the running of the statute until final audit. This was also the holding in *American Eastern, supra,* 133 F. Supp. at page 15.

To avoid the impact of these decisions, the appellants have restated their theories but even as restated most of them were presented and rejected in *Sword Line* and

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party under the terms of the agreements involved or otherwise." (May 14, 1951 letter from Maritime.)

American Eastern. The "mutual account" or "open account" theory as advanced by Judge L. Hand was rejected by his colleagues in *Sword Line*, 228 F. 2d at 347, and by the court in *American Eastern*, 133 F. Supp. at page 15. Nor were the preliminary charter hire payments a "trust fund" because they were kept in a special account. This argument was forcefully brought to the court's attention in the *American Eastern* appeal by a letter from appellants' counsel which thoroughly discussed the point and cited the court to *Rosenman* v. *United States*, 323 U. S. 658. In its petition for rehearing in *Sword Line*, the appellant made essentially the same argument but in somewhat more general terms.

There remains the contention, forcefully urged by those appellants to whom it is available, that, even if suits for refund of payments made prior to redelivery of the ships are time-barred, the court had jurisdiction over those libels which demanded refund of post-redelivery payments to the Commission which were made within two years of the filing of the libel. (For libels so situated, see the Appendix hereto.) The Government replies that the libelants cannot now demand refund since such payments were voluntary, citing *Railroad Co.* v. *Commissioners*, 98 U. S. 541, and *Cunard S.S. Co.* v. *Elting*, 2 Cir., 97 F. 2d 373, and that, in any event, since the libelants accepted the ships on the Commission's terms, they are now estopped from disputing them, citing *Commissioner of Internal Rev.* v. *National Lead Co.*, 2 Cir., 230 F. 2d 161, aff'd on other grounds 352 U. S. 313.

This point was unmistakably presented and was disposed of without discussion by another panel of this court in *Sword Line* in an opinion which did not explain why the court lacked jurisdiction of the claim for recovery of the post-redelivery payments. However, the rationale of the opinion in that case which was equally applicable

to payments made before and after redelivery, and the rationale of *American Eastern*, required the orders of dismissal now before us on review. Indeed, in its briefs and its petition for rehearing in *Sword Line*, the libelant pointed out that after redelivery and within two years prior to the libel it had paid to the Commission $660,000, which it contended was additional charter hire. Yet the court held that there was no jurisdiction to entertain the claim.

Apparently the only point now pressed which was not determined in *Sword Line* or *American Eastern* was raised in the Blidberg libel. This concerned a claim for expenses incurred in repairing latent defects which existed when the ships were received by Blidberg. But this claim was obviously in existence, at the very latest, when the ships were redelivered. Since the libels were not filed within two years of the redelivery these claims are barred. 46 U. S. C. A. §745.

If the subject-matter of these appeals were *res nova*, we are by no means sure that our dispositions would coincide with those made by the majority opinion in *Sword Line* and by *American Eastern*. However, we will not overrule these recent decisions of other panels of the court. On the authority of *Sword Line* and *American Eastern* we hold that these libels also were barred.

Accordingly, the decrees appealed from are affirmed except the Dichmann, Wright & Pugh, Inc. appeal which is dismissed.

APPENDIX

Docket No.	Name of Libelant	Libel Filed	Charter Contracts Signed	Last Ship Redelivered	Last Final Audit	Date of Last Payment to Maritime	Date of Last Item in Account
24190	American-Foreign S.S. Corp.	11/24/54	6/ 6/46 9/ 2/46	12/28/49	10/11/54*	9/21/53	9/21/53
24200	Stockard S.S. Corp.	10/ 5/54	9/ 2/46 8/21/50 1/ 5/51	2/11/52*	5/20/55 (supplement)	6/23/53	12/21/53
24283	**Dichmann, Wright & Pugh, Inc.	5/13/54	9/ 2/46 10/ 5/46	12/10/49*	12/12/52	2/26/53	11/20/53
24284	Polarus S.S. Co., Inc.	11/10/54	10/18/46	12/ 7/49*	11/13/52	4/ 6/53***	7/29/54
24285	A. L. Burbank & Co., Ltd.	5/27/54	9/26/46 9/ 3/46	4/17/48*	11/ 9/54	3/16/53	4/25/55
24286	T. J. Stevenson & Co., Inc.	3/16/55	11/18/46	12/ 2/49*	9/ 1/53	11/27/53	6/10/54
24287	North Atl. & Gulf S.S. Co.	12/16/54	10/31/46	6/10/48*	None yet	5/18/53	5/17/54
24288	Luckenbach S.S. Co., Inc.	12/20/55	7/12/46 9/24/46 1/ 5/51	4/23/51	12/22/53 No audit yet on 1951 contract	No payments after 12/20/53	12/14/53
24289	North Atl. & Gulf S.S. Corp.	10/21/54	7/17/51 4/ 2/52	2/13/52*	11/ 8/54 No audit yet for 12/54 contracts	9/27/53	5/17/54
24291	A. H. Bull S.S. Corp.	4/22/54	4/21/47 9/ 2/46 9/13/46	2/26/48*	5/12/52	8/18/53	9/29/53
24292	New York & Cuba Mail S.S. Co.	1/27/55	11/12/46 11/25/46 10/26/50 11/28/50	5/28/52*	10/ 4/54	9/24/53	12/ 7/54
24400	Blidberg Rothchild Co., Inc.	4/13/56	6/25/46 9/ 4/46	11/28/49	4/16/54	8/19/55***	11/ 7/56
24401	Fall River Navigation Co.	2/14/56	6/ 1/46 9/ 2/46	10/28/49	3/10/54	No payments after 2/14/54	6/ 9/52
24402	Fall River Navigation Co.	2/14/56	6/ 1/46 9/ 2/46	10/28/49	3/10/54	No payments after 2/14/54	5/10/54

* Information obtained from exceptive allegations.

** This covers only first cause of action.

*** Setoff; not actual payment.

OPINIONS OF FIRST EN BANC COURT DENYING GOVERNMENT'S PETITION FOR REHEARING (American-Foreign Steamship Corporation, et al. v. United States, 265 F. 2d 136, 153 (2 Cir. 1959))

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Submitted August 26, 1958 Decided March 26, 1959.)

Docket Nos. 24190, 24200, 24291-2, 24283-9, 24400-2

AMERICAN-FOREIGN STEAMSHIP CORPORATION,

Libelant-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee,

And thirteen companion cases.

Before:

CLARK, *Chief Judge,*

MEDINA, HINCKS, WATERMAN and MOORE, *Circuit Judges.*

Petition of Appellee for Further Rehearing en Banc

GEORGE COCHRAN DOUB, Assistant Attorney General, Washington, D. C., Arthur H. Christy, United States Attorney, Southern District of New York, New York, N. Y., Leavenworth Colby, Chief, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C., Benjamin H. Berman, Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice, and William E. Gwatkin, III, Atty., Admiralty & Shipping Section, Dept. of Justice, *for petitioner.*

HINCKS, *Circuit Judge*:

The United States, as appellee, attacks the decision carried in our opinion of July 28, 1958, on the ground, *inter alia*, that Judge Medina, who concurred therein, by virtue of his retirement on March 1, 1958 was disqualified under 28 U. S. C. A. §46(c) from participating. We disagree.

It was on December 19, 1957 that we granted rehearing of our earlier decision before the court *in banc*. The court *in banc* comprised Chief Judge Clark, Judges Medina, Hincks, Waterman and Moore, all then active circuit judges. Judge Lumbard declined to sit with the court on the ground that he was disqualified by reason of earlier contacts with the cases below when serving as United States Attorney. The court *in banc* when thus constituted conformed in all respects to 28 U. S. C. A. §46(c) which provides: "A court in banc shall consist of all active judges of the circuit." Since Judge Medina was a member of the court *in banc* which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached. Nothing in the Code requires that the court of appeals when once constituted according to law, whether *in banc* or by assignment as an authorized division, shall suspend its judicial task and reconstitute itself either to exclude an active member of the court thereafter retiring or to include an active member of the court thereafter appointed. As the Reviser's note indicates, §46 was included in the Code of 1948 to preserve the interpretation established by *Textile Mills Securities Corporation* v. *Commissioner of Internal Revenue*, 314 U. S. 326, that notwithstanding the three-judge provision of §212 of Title 28 U. S. C., 1940 Ed., a court of appeals might lawfully consist of a greater number of judges sitting *in banc*. Nothing in *Textile Mills* nor the Code provisions which preserve its interpretation suggests that retirement

under 28 U. S. C. A. §371 operates to terminate the power of the retiring judge as a member of the court *in banc* to participate in the decision of a case formerly assigned to the court but as yet undecided. We have found no reported case which so holds. We think the case of *Commercial National Bank in Shreveport* v. *Connolly*, 5 Cir., 177 F. 2d 514, supports our conclusion that the competence of a judge who is once duly constituted a member of a court *in banc*, may survive his retirement. There Judge Sibley who as an active member of the Fifth Circuit Court of Appeals had participated in the decision of a case heard *in banc*, thereafter retired (on October 1, 1949) and *subsequently* cast the decisive vote for an order (filed November 16, 1949) denying a petition for rehearing which had been made to the court *in banc*.

Moreover, §43(b) of the Code of 1948 provides: "Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court." This provision is not stated to be exclusive of the "judges designated or assigned" to hear and determine a case as members of a court *in banc*. The provision is as applicable to such judges as it is to judges designated and assigned to the divisions of the court provided for in §46(b) and to judges designated and assigned under §§294 and 296. The provision thus lends further support to our conclusion that Judge Medina, who under §46(c) was designated and assigned as a member of the court *in banc* was competent even after his retirement to sit under §§43(b), 294(b) and 296.

The other claims of error raised in the petition we think unfounded. They involve matters already carefully considered by us. And the requested clarifications we think unnecessary and inappropriate. We have reversed and remanded for a determination of jurisdiction and, if juris-

diction be sustained, of the merits. We have made it plain that these determinations should be made without constraint by *Sword Line* v. *United States*, 2 Cir., 228 F. 2d 344, and *American Eastern Corp.* v. *United States*, 2 Cir., 231 F. 2d 664, and of course in conformity with our opinion of July 28, 1958. The questions now put to us are questions for answer by the parties and the trial court.

Petition denied.

Separate statement of CLARK, *Chief Judge*, and WATERMAN, *Circuit Judge*:

Judge Hincks' opinion herewith demonstrates both the difficulty and the impracticability of interpreting the governing statute, 28 U. S. C. §46(c), otherwise than by giving the word "determined" its normal meaning of "decided," and the word "active" its natural force of "non-retired." This view is underlined by the contrast drawn between judges "in active service" and "retired" judges, even though designated to sit, in the several statutes such as 28 U. S. C. §§294(b) and (d), 295, 296, and 371(b). It appears to be the general conclusion of other circuits. *In re Sawyer*, 9 Cir., 260 F. 2d 189, 203, n. 17, certiorari granted 358 U. S. 892; *G. H. Miller & Co.* v. *United States*, 7 Cir., 260 F. 2d 286, 305; *United States* v. *Gordon*, 7 Cir., 253 F. 2d 177, 185, 191, 194; see also *United States* v. *Sentinel Fire Ins. Co.*, 5 Cir., 178 F. 2d 217, 239, and *Commercial Nat. Bank in Shreveport* v. *Connolly*, 5 Cir., 177 F. 2d 514, interpreted in the light of Fifth Circuit Rule 29 stating the vote required for a rehearing. And it has been the uniform practice of our own elder colleagues. *Reardon* v. *California Tanker Co.*, 2 Cir., 260 F. 2d 369, 375, 376, certiorari denied *California Tanker Co.* v. *Reardon*, S. Ct., March 2, 1959; *United States* v. *Silverman*, 2 Cir., 248 F. 2d 671, 696, certiorari denied 355 U. S. 942; *Harmar Drive-In Theatre*

v. *Warner Bros. Pictures,* 2 Cir., 241 F. 2d 937, certiorari denied 355 U. S. 824. Moreover, it is necessary if the obviously indicated policy that the active circuit judges shall determine the major doctrinal trends of the future for their court is not to be flouted by the freezing in of a particular grouping of judges for months (as here) or even for years. And so notwithstanding some personal regret and even doubt as to the ultimate wisdom of the policy, it must be held that the decision of July 28, 1958, purporting to reverse the decrees below is ineffective and void for lack of a valid majority vote and those decrees under consideration here must stand affirmed by an equally divided court. *People* v. *Bork,* 96 N. Y. 188, 199; *Watson* v. *Payne,* 94 Vt. 299, 111 A. 462.

SUPREME COURT, U. S.

FILED
SEP 22 1961
JAMES R. BROWNING, Clerk

Nos. 290 and 332

In the Supreme Court of the United States

OCTOBER TERM, 1961

AMERICAN-FOREIGN STEAMSHIP CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

STOCKARD STEAMSHIP CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 290

AMERICAN-FOREIGN STEAMSHIP CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 332

STOCKARD STEAMSHIP CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (Palmieri, D.J.) covering 11 of the 14 libels involved is reported as *A. H. Bull Steamship Co.* v. *United States,* 141 F. Supp. 58. The opinion of the United States District Court for the Southern District of New York (Herlands, D.J.) covering the other three libels is not reported, but is set forth in footnote 2 to the

opinion of the three-judge panel of the United States Court of Appeals for the Second Circuit reported at 265 F. 2d 136, 140. The opinion of the three-judge panel of the Court of Appeals, the original opinion of the Court of Appeals on petition for rehearing *en banc* (subsequently vacated by this Court's decision in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685) and the opinion of the Court of Appeals denying the petitions for further rehearing *en banc* are reported at 265 F. 2d 136. The *en banc* decision of the Court of Appeals upon remand of the case from this Court (Pet. App. in No. 290, pp. 25–60; Pet. App. in No. 332, pp. 27a–68a) is reported at 291 F. 2d 598.

JURISDICTION

The judgments of the Court of Appeals, sitting *en banc* (Pet. App. in No. 290, p. 61; Pet. App. in No. 332, pp. 69a–72a), were entered on May 26, 1961. The petition for a writ of certiorari in No. 290 was filed on August 5, 1961. The petition for a writ of certiorari in No. 332 was filed on August 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals properly held that petitioners' libels, insofar as they alleged illegality of the rate of additional charter hire, were time-barred under the limitations provision of the Suits in Admiralty Act.

STATUTE AND CHARTER PROVISION INVOLVED

Section 5 of the Suits in Admiralty Act, 41 Stat. 526, 46 U.S.C. 745, provides in pertinent part:

> Suits * * * may be brought only within two years after the cause of action arises * * *.

Clause 13 of the charters provides:

> *Additional Charter Hire.*—If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum of the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D.C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):
>
> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.
>
> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in

excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (Warship-demiseout) charter (prior to the times of payment provided for above or in such Warship-demiseout charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

STATEMENT

1. THE NATURE OF THE LITIGATION

Each of the petitioners chartered ships from the government pursuant to the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1735, *et seq.*, and agreed in Clause 13 of their charters, *supra*, pp. 3–4, to terms which made additional charter hire dependent in part upon the amount of profit realized by the charterer. Petitioners' libels below were predicated,

in principal part, on the claim that the Maritime Commission—in providing for a "sliding scale" whereby the government might obtain as much as 90% of the profits in excess of $300 per day, per vessel, above a certain return on employed capital—had not acted under Section 5(b) of the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U.S.C. App. 1735, *et seq.*, and had violated the provisions of Section 709(a) of the Merchant Marine Act of 1936, 49 Stat. 1985, 46 U.S.C. 1199(a), which petitioners seek to read as limiting the government to a flat 50% of profits above the return on employed capital. Petitioners sought to recover amounts of additional charter hire in excess of this 50% rate, on the theory that such amounts were illegally assessed by the Commission (*e.g.*, Pet. App. in No. 290, pp. 28–30). In addition, certain of the libels challenged methods of accounting used by the Commission and the Commission's disallowance of certain expenditures involving determinations under the charters as to the amount of "capital necessarily employed," "post-redelivery overhead expenses", "the cost of repairing latent defects", "management fees" and "agency fees" (Pet. App. in No. 290, pp. 29–30).

In each case, the government moved to dismiss the libel because of lack of jurisdiction, on the ground that all of the claims were barred by the two-year limitation prescribed by the Suits in Admiralty Act, 46 U.S.C. 745, *supra*, p. 3.

The facts, varying as to payments of hire and redelivery of the vessels in each case, are, most briefly, as follows. The charters were entered into at various

times commencing in 1946, and each contained Clause 13, *supra,* pp. 3–4. Redelivery of the vessels and termination of active operation under the charters took place in each instance more than two years prior to the filing of the libels. Some of the charterers made final payments of additional charter hire within two years of filing their libels, others did not (*e.g.,* Pet. App. in No. 290; p. 30). In no case was a libel filed within two years of the time that the charters were executed and petitioners assertedly protested the legality of the "sliding scale"; nor in any case was a libel filed within two years after the first preliminary payments of additional charter hire were made (*e.g.,* Pet. App. in No. 290; pp. 31–33).

2. THE PROCEEDINGS PRIOR TO THE EN BANC DECISION BELOW

In the District Court, the libels were dismissed by Judges Palmieri and Herlands as time-barred, on the authority of the Second Circuit decisions in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, affirmed on rehearing, 230 F. 2d 75, affirmed on the question of admiralty jurisdiction, 351 U.S. 976, and *American Eastern Corp.* v. *United States,* 133 F. Supp. 11 (S.D. N.Y.), affirmed *per curiam,* 231 F. 2d 664, certiorari denied, 351 U.S. 983.[1]

---

[1] The course of the proceedings below prior to this Court's decision in *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, and the subsequent *en banc* decision of the Second Circuit, is traced in more detail in the brief for the United States in this Court in *American-Foreign*, No. 138, October Term, 1959.

These decisions were affirmed by a three-judge panel of the Second Circuit on the basis of the rulings in *Sword Line* and *American Eastern, supra.* Rehearing *en banc* was then ordered. On the original rehearing *en banc,* a majority of the Court of Appeals, consisting of Judges Hincks, Moore and Medina, overruled *Sword Line* and *American Eastern,* and held that Clause 13 of the charters established an adequate *prima facie* showing of jurisdiction, *i.e.,* that the libels were filed within two years after the causes of action arose. The court remanded the cases for the taking of further evidence as to the meaning of this clause and for final disposition of the limitations issue on the basis of such evidence. In dissent, Judges Clark and Waterman observed that the normal rule in actions for unjust enrichment,[2] as declared by the Second Circuit in ruling on the same question of limitations in *Sword Line* and *American Eastern* (which also involved Clause 13), is that the period begins to run when the first payment of additional charter hire is made. In their view, this rule should be set aside only if the charter plainly manifests a contrary purpose, and they felt that even the majority had found no such contrary expression of intention in Clause 13; moreover, analysis of this clause and the underlying regulations clearly demonstrated that they were in no way concerned with libelants' claim of

[2] These libels for allegedly illegal assessment of additional charter hire were characterized as actions for unjust enrichment in this Court's decision in *Sword Line, Inc.* v. *United States,* 351 U.S. 976.

illegal assessment of additional charter hire and that the Second Circuit's earlier decisions in *Sword Line* and *American Eastern* were correct.

After the government's petition for further rehearing *en banc* was denied, this Court granted certiorari and ruled in the government's favor on the limited issue that Judge Medina had no right to participate in the *en banc* decision since he had retired after the *en banc* rehearing had been ordered but prior to decision. *United States* v. *American-Foreign Steamship Corporation,* 363 U.S. 685. The Court vacated the *en banc* decision and remanded the causes to the Second Circuit for further proceedings. Petitioners' conditional cross-petitions, seeking review of the limitations issue, were denied. 363 U.S. 841; 363 U.S. 842.

3. THE EN BANC DECISION BELOW

Upon remand, the Second Circuit ordered a new rehearing *en banc,* with active Circuit Judges Clark, Waterman, Moore, Friendly and Smith participating.[3] The government prevailed on the issue of whether the libels, insofar as they challenged the legality of the rate of additional charter hire, were time-barred. Speaking for a majority of himself and Judges Clark and Waterman, Judge Smith ruled that the libels, in this respect, were unaffected by the provisions of Clause 13 and consequently were barred

[3] Chief Judge Lumbard again did not take part, having disqualified himself because of prior connection with the case as United States Attorney.

by the limitations provision of the Suits in Admiralty Act. Noting that the controversies were ripe for action when the libelants protested the legality of the "sliding scale" rate in 1946, Judge Smith observed that suits for a declaratory judgment should have been brought at that time, or suits for refund should have been brought, at the latest, upon the first payments of additional hire under the disputed rate (Pet. App. in No. 290, pp. 31–32). Indeed, libelants, as a further alternative, could have refused to make these payments and forced the government to sue them for the amount assessed under the "sliding scale" (Pet. App. in No. 290, pp. 32–33). On his analysis of the language of Clause 13 and the evidence submitted by affidavit by libelants, Judge Smith found that this clause could not conceivably bear the heavy weight of the interpretation libelants wished to place on it, *i.e.*, that it postponed the need to sue with regard to the assertedly illegal rate until years after payments of additional charter hire and redelivery of the vessels (Pet. App. in No. 290, pp. 33–38). The payments of additional charter hire made within two years of filing a libel but after redelivery of the vessels, the majority held, were clearly voluntary and not recoverable in an action against the United States (Pet. App. in No. 290, pp. 40–42).

Judge Smith ruled differently with respect to those claims in certain libels not involving the asserted illegality of the rate but challenging certain accounting procedures employed by the Maritime Commission and its disallowance of certain expenditures (Pet.

App. in No. 290, pp. 38–40). In his view, Clause 13 might conceivably apply to certain of these "accounting" claims, and the libels asserting them should be remanded for the taking of further evidence.[4]

Judges Clark and Waterman agreed with Judge Smith on the illegal rate ruling, reiterating their earlier view (in the prior *en banc* proceeding) that not only Clause 13 but the Maritime regulations were completely inconsistent with petitioners' claim of postponement of the need for bringing suit on this issue. Furthermore, in their view, Clause 13 could not be read to save any of the claims asserted in the libels, those covering accounting procedures as well as those challenging the legality of the "sliding scale".

Judges Friendly and Moore dissented, agreeing with the majority in the prior *en banc* determination that the causes should all be remanded for the taking of further evidence as to the meaning of Clause 13 with respect to the issue of the timeliness of the libels (Pet. App. in No. 290, pp. 49–60).

ARGUMENT

For the fourth time since the inception of litigation on these claims, the specific issue raised by petitioners has now been brought to this Court. In each prior instance, the Court has refused to take the question. With valid *en banc* resolution (consistent in result

[4] The United States is filing a conditional cross-petition with regard to this part of the decision, asking that, if the Court grant writs of certiorari in Nos. 290 and 332, it take the entire case including the ruling of the majority below remanding the questions concerning accounting procedures.

with the prior Second Circuit panel decisions in *Sword Line* and *American Eastern*) now accomplished, there is less reason for a grant of certiorari at this time than there was previously. Moreover, the Second Circuit's *en banc* decision is admittedly not in conflict with any other ruling on the limitations issue presented by these cases. That issue was correctly decided below, and is confined to similar litigation pending in other courts which was likewise pending at the time of this Court's earlier denials of certiorari.

1. As petitioners point out (Pet. in No. 290, p. 12; Pet. in No. 332, p. 23), this is the fourth time that the limitations issue raised by their petitions has been brought to this Court. In *Sword Line, Inc.* v. *United States,* 228 F. 2d 344, affirmed on rehearing, 230 F. 2d 75, the Second Circuit for the first time ruled on the question of limitations in a suit similar to those involved here, challenging the legality of the rate of additional charter hire, and held that the libel was time-barred. This Court granted the libelant's petition for a writ of certiorari, limiting that grant, however, to the question of admiralty jurisdiction, upon which it affirmed the lower court's decision. It did not take the limitations issue. 351 U.S. 976.

Subsequently, the Second Circuit affirmed, *per curiam,* the decision of the District Court for the Southern District of New York again holding such a libel time-barred. *American Eastern Corporation* v. *United States,* 133 F. Supp. 11 (S.D.N.Y.) affirmed, 231 F. 2d 664. Once again, this Court denied the libelant's petition for a writ of certiorari on the limi-

tations issue posed in the instant petitions. 351 U.S. 983. Finally, in the 1959 Term, the petitioners here filed conditional cross-petitions urging this Court, for the same reasons advanced in the prior petitions, to resolve the limitations issue. This Court denied those conditional cross-petitions. 363 U.S. 841; 363 U.S. 842.

Petitioners have not set forth any reasons why the limitations issue, limited to this type of case and chartering transaction, is any more deserving of resolution by this Court at the present time than it was on the earlier petitions. It is true that the government acquiesced in the granting of certiorari on the three prior occasions. However, it is clear by now that this Court views the issue as one not meriting further review here. On this ground alone the present petitions should be denied.[5]

2. While petitioners admit that there is no conflict between the decision below and that of any other court on the limitations issue (*e.g.*, Pet. in No. 290, pp. 15–16), they attempt to overcome this lack of intercircuit conflict by asserting as a basis for certiorari that the decision below creates an intracircuit conflict. We submit that, even were an intracircuit conflict a basis for this Court's review, the assertion that such a con-

[5] The bases for the government's past acquiescence, namely the amount of money involved and the number of pending lawsuits, are relied on once again by petitioners here. These factors, however, have all been brought to this Court's attention in the earlier petitions denied by the Court. Moreover, the government's acquiescence was based, in part, upon the desire to have the issue resolved more speedily. That resolution has now been sufficiently accomplished.

flict still exists is patently unsound in the face of the *en banc* resolution below. *En banc* resolution is, of course, the very method provided for a court of appeals to avoid conflicts of decision by different panels of its members. See *e.g.*, Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96, cited by this Court in *United States* v. *American-Foreign Steamship Corp., supra*, 363 U.S. at 688, 690; see also *Wisniewski* v. *United States*, 353 U.S. 901. Such resolution was had below, and the result, moreover, is perfectly consistent with all prior panel decisions in these cases and the earlier suits of identical nature. The fact that there are a majority (including a concurrence) and a dissent does not establish an intracircuit conflict.

In addition, petitioners argue that the decision below is unclear and will be a confusing precedent for other courts before which similar litigation is pending. Judge Smith's view, however, is quite clear: the libels, insofar as they attacked the legality of the additional charter hire rate, should have been brought, at the earliest, within two years from the dates of execution of the charters after petitioners had protested, or, at the latest, within two years after they had made their first payments of additional charter hire under the protested rate. Judges Clark and Waterman agreed on this issue relating to the legality of the charter rate but would have gone further and held all claims time-barred, including those challenging accounting procedures (which Judge Smith held should be remanded for the taking of further evidence). Judges Friendly and Moore felt that all claims should

be remanded for the taking of further evidence as to the meaning of Clause 13. The lines thus drawn are plainly delineated. Other courts outside the Second Circuit, in which similar litigation is pending, may choose one view or the other as to whether the illegality claim and those with regard to accounting procedures are time-barred, but this Court need not ground a grant of certiorari on the mere possibility of a future conflict between the Second Circuit and another circuit on this type of issue.

3. The decision reached by the *en banc* court, moreover, is correct. Libelants have failed in their numerous opportunities to demonstrate the inapplicability of the normal rule that the time for bringing suits for unjust enrichment commences to run at the time of initial payment. As the majority below concluded, in accord with the prior Second Circuit panel decisions, Clause 13 cannot be read to bear the weight of petitioners' interpretation—that it was intended to postpone the necessity for their bringing suit on the claim of illegality of the additional charter hire rate until many years after the first payments of such hire, performance of the charters, and redelivery of the vessels (*e.g.*, Pet App. in No. 290, pp. 33–34). And, as Judges Clark and Waterman observed, with respect to the claims asserting illegality as well as those challenging accounting procedures, the underlying Maritime regulations, when read together with Clause 13, afford no support for petitioners' position (*e.g.*, Pet App. in No. 290, pp. 46–47).

4. The issue of limitations posed by these petitions is not a recurring one since it is confined to a form of

charter entered into pursuant to the Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1735, *et seq.* On January 30, 1957, the provisions of Clause 13 were substantially changed so that the limitations problem appears no longer to be presented by charters pursuant to that Act. 22 F.R. 609. Moreover, chartering by the government of war-built cargo vessels subsequent to 1950 was sharply curtailed under the restrictions of Section 5(e) of the Act, 50 U.S.C. App. 1738(e),[6] and it is our understanding from the Maritime Commission that very few charters for cargo vessels, pursuant to the 1946 statute, are currently being executed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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[6] See 1950 U.S. Code Congressional Service, pp. 2656–2658.

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IN THE

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OCTOBER TERM, 1961

STOCKARD STEAMSHIP CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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1. The Government has filed a conditional cross-petition in No. 438, in which petitioners herein have acquiesced in their response filed concurrently herewith.

2. The Government's memorandum filed in 1959,[1] acquiescing in the cross-petitions seeking review of the limitations issue, stated that "an *en banc* decision on the limitations issue by the court below, if validly made, would

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[1] *American-Foreign Steamship Corporation* v. *United States* and *Stockard Steamship Corporation, et al.* v. *United States* (Memorandum of the United States in Nos. 322 and 334, October Term, 1959, pp. 2-3).

be almost a prerequisite to review of the issue by this Court." It also there stated that an "early resolution [of the limitations issue] appears desirable from the standpoint of the administration of justice . . ."

A valid *en banc* decision has been rendered, but now that the Government, as Justices Harlan, Frankfurter and Brennan suggested when the case was last here (363 U.S. 685, 696), has retrieved its loss, it has receded from its 1959 position that review by this Court is necessary and desirable.

3. Clause 13 admittedly was amended because of the existence of the principal dispute alleged in the libels, and Judge Smith's view (in which none of his colleagues concurred) that the clause does not apply to that dispute, is incomprehensible. And, contrary to the Government's brief in opposition (p. 13), the one-two-two opinion below does not resolve the conflict within the Second Circuit as to the crucial question of the effect of Clause 13 on the date of accrual of the cause of action.[2] The decision therefore furnishes no final guidance either to the District Court for the Southern District of New York, or to other circuits and district courts, which must deal with the twenty-seven similar cases awaiting an authoritative determination herein.

4. When the Government petitioned for review of the earlier *en banc* decision favorable to petitioners, it urged that there were present in these cases questions of importance in the administration of justice (Petition in No. 138, October Term, 1958, p. 7). The petition herein similarly

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[2] Judge Smith held that Clause 13 reserved some disputes and not others. Judges Friendly and Moore (and Judges Medina and Hincks before them) read Clause 13 as reserving all disputes until final audit. Judges Clark and Waterman believed the clause reserved all disputes, but to a date earlier than final audit.

raises a number of questions of public importance, but the Government has passed them over in complete silence.

5. The Government's opposition (pp. 14-15) states that the limitations issue is not a recurring one since the provisions of Clause 13 were changed on January 30, 1957, and therefore the issue will not arise in the future under charters made by the Maritime Administration. The Government's statement is in error. While Clause 13, after January 30, 1957, omitted the preliminary payment language, nevertheless substantially identical language was retained in the regulations applicable to current charters. (See 46 C.F.R. 299.31(k) and 299.39.)

Petitioners urge, therefore, that their petition be allowed.

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